JD–67–06
Kettering, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE OAKS OF WEST KETTERING, INC.

and CASE NO. 9-CA-42153

SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199, THE HEALTH CARE & SOCIAL SERVICE UNION, AFL-CIO

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DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Cincinatti, Ohio, on May 2 and 3, 2006. The charge was filed on June 6, 2005, by Service Employees International Union District 1199, The Health Care & Social Service Union, AFL-CIO (the Union) and the complaint was issued on March 9, 2006 against The Oaks of West Kettering, Inc. (Respondent). The complaint alleges that since at least April 2, 2004, and continuing until about November 12, 2004, Trans Healthcare, Inc., (THI) operated a nursing home in Kettering, Ohio called Auburn Hills. The complaint alleges that pursuant to an election and certification issued by the American Arbitration Association (AAA) under the terms of a "neutrality agreement" contained in a collective-bargaining agreement between the Union and THI effective from April 1, 2004, to March 31, 2009, the Union was the exclusive collective bargaining representative from July 20, 2004 to November 12, 2004, of the following unit employed by THI:

> All service and maintenance employees, including but not limited to: Certified nursing assistants, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, at the 1150 West Dorothy Lane, Kettering, Ohio facility but excluding professional employees, RNs, managers, supervisors, department heads, confidential employees including medical records, physical therapy assistants, respiratory therapists, social workers, technicians, and guards as defined by the Act.[1]

[1] The parties stipulated at the hearing the above unit is an appropriate unit for collective
Continued

The complaint alleges that from about November 12, 2004, to about May 5, 2005, LTC Workouts operated Auburn Hills as a receiver (LTC or the Receiver) on behalf of THI and its creditors in basically unchanged form and employed as a majority of its employees individuals who were previously employed by THI at Auburn Hills and that LTC recognized the Union as the exclusive collective-bargaining representative of the employees in the unit. The complaint alleges that since about May 5, 2005, Respondent began operating Auburn Hills, and has since continued to operate the facility in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of THI and LTC at Auburn Hills. The complaint alleges Respondent continues as the employing entity and is a successor to THI and LTC and that since May 6, 2005, Respondent has refused the Union's request to recognize and bargain with the Union in the unit set forth above and that by its actions Respondent has violated Section 8(a)(1) and (5) of the Act.[2]

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and the Respondent, I make the following

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bargaining between Respondent and the Union upon agreement from all parties that LPNs are to be excluded from the unit based on the Respondent's position that they are supervisors.

[2] Respondent denies in its amended answer to the complaint that it has violated the Act. It asserts in the amended answer that Auburn Hills was operated by THI of Columbus, Inc. (THI Columbus), not THI and that LTC operated Auburn Hills for THI Columbus and its creditors not THI. Respondent asserts as an affirmative defense that LTC refused to recognize the Union on or before December 7, 2005, therefore any alleged liability of Respondent as a successor employer to LTC is barred by Section 10(b) of the Act. Respondent states in its post-hearing brief at page 5, footnote 14 and at page 32 it is not contending as an affirmative defense that the Union abandoned the unit. I would reject such a defense even if raised. The Union won an election at Auburn Hills in July 2004. Thereafter, the Union held an election for employee Union delegates of which 8 were elected. The Union attempted to schedule a labor management meeting in November 2004, which was cancelled by the facility's administrator. The Union appointed an administrative organizer to service the facility, who made multiple efforts to meet with employees, including processing a grievance for a discharged employee in January 2005 through phone calls with the administrator. After the facility went into receivership in November 2004, the Union sent a request to bargain to the Receiver, and had multiple meetings with the Receiver's officials. The Receiver's attorney testified he received 30 phone calls from Union officials. When the Receivership sold the facility in May 2005, the Union immediately followed the transaction by a phone call to the facility, and twice in May 2005 sent a request to bargain to the purchaser including a request for information.

[3] Counsel for the General Counsel filed a motion to reopen the record to substitute a complete version of General Counsel's Exhibit 25 claiming a copying error in the original document. Respondent at first filed an opposition to the motion. However, by fax dated June 20, 2006, Respondent withdrew its opposition. Finding the substitute document to be a complete version of the original and with no opposition from Respondent, the General Counsel's substitute Exhibit 25, along with the accompanying motion, Respondent's initial opposition, and Respondent's subsequent fax are all admitted into evidence as General Counsel's Exhibit 25.

[4] In making the findings herein, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Kettering, Ohio, has been engaged in the operation of a nursing home where during the past 12 months it has derived gross revenues in excess of $100,000, and has purchased and received goods valued in excess of $50,000 directly from points outside Ohio. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Raymond Martinez was employed by THI as vice president of human resources at the time of his testimony.[5] Martinez identified a document entitled, "Organizing, Neutrality and Election Procedure Agreement." The document, referred to herein as the neutrality agreement, by its terms, is between SEIU and its affiliated locals, and THI on behalf of itself and the nursing facilities set forth in an exhibit attached thereto. The neutrality agreement states it was made as of April 1, 2004, and that it applied to the Union and to all owned or leased THI facilities in Ohio and Maryland. The neutrality agreement, which proclaims THI's neutrality, sets forth certain organizing and election procedures for named unorganized nursing home facilities listed in the exhibits attached thereto of which Auburn Hills was one.

Martinez testified that during, January through March, 2004, THI negotiated a national collective-bargaining agreement with SEIU referred to herein as the national contract. The national contract by its terms was entered into on April 1, 2004, between THI owned and leased nursing facilities and SEIU signatory local unions covering all THI employees "that are currently employed or hereafter become employed in bargaining units for which a signatory local union is or becomes the recognized collective bargaining representative." Martinez testified once election results were certified for a previously unorganized nursing home then the employees in the facility fell under the national contract. Martinez testified Michael Wilson, senior vice president of labor relations for THI, was THI's chief spokesperson for the negotiation of the national contract, and Martinez was on THI's bargaining committee. Martinez reports to Wilson. Becky Williams, the executive vice-president and long-term care divisional director for the Union, testified she was part of the Union's negotiating team that bargained the national contract. Williams, a long time union official, testified that during contract negotiations they discussed facilities THI either operated or managed and Auburn Hills was one of the then unorganized facilities discussed.[6]

Martinez testified THI was responsible for the 35 Ohio non union facilities listed on page 15 of the neutrality agreement, which included Auburn Hills. He testified THI managed the buildings and negotiated an agreement for the buildings which were either owned or leased by THI. Martinez testified whether or not the employees of those facilities were THI employees, that "We supervised the employees, we managed the employees, we hired the employees, we

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[5] I found Martinez, upon observing his demeanor and the nature and content of his testimony, to be a careful and credible witness, who testified in a truthful manner to the extent his knowledge and memory would permit.

[6] I found Williams, considering her demeanor, to be a credible witness. She testified in a calm fashion with good recall. Her testimony was consistent and made sense when considering the record as a whole including the documentary evidence.

fired the employees. We give the employee pay wage -- pay raises …". He testified THI performed these functions for Auburn Hills. Martinez testified "we operated the building. We operated it from patient care. We brought the residents in. We took care of the residents. We provided the supplies that were necessary to take care of those residents." Martinez testified the people THI hired to operate the building hired the employees in the building regardless of whether it was leased or owned by THI. Martinez thought Auburn Hills was a leased facility.

Martinez testified THI of Columbus, Inc. (THI Columbus) was an entity related to THI, but Martinez did not know the relationship. Martinez did not know whether THI or THI Columbus operated Auburn Hills. However, Martinez testified he had the authority to negotiate on behalf of THI Columbus and THI in that THI CEO Tony Misitano gave Martinez that authority. Martinez testified he understood the negotiations for the national contract included Auburn Hills. Martinez testified THI Columbus was part of the national contract, although it is not specifically referenced therein. Similarly, Williams testified it was her understanding THI Columbus was part of THI and there were 16 homes THI operated or managed under the name of THI Columbus. She testified SEIU had a labor agreement with THI Columbus since the national contract covered homes THI operated under that name as well as under the names THI Cleveland and THI Baltimore. She testified the neutrality agreement included homes that came under the name of THI Columbus. Williams testified when she bargained with THI for the Union Misitano, Wilson and Martinez bargained on behalf of 50-plus facilities some of which were operated under the name of THI Columbus. Williams testified the THI officials did not explain the relationship between the entities, but they said they either owned or leased the homes, and they operated or managed all the facilities and had legal authority to bargain for the facilities for which they reached agreement with the Union. It was Williams' understanding Auburn Hills was leased to THI Columbus, along with the Cridersville, Oak Grove and Autumn Court facilities all of which the Union claimed it had under contract.

Martinez and Williams' credited testimony reveals that: Under the terms of the neutrality agreement, on June 28, 2004, the Union sent Wilson a notice of intent to organize three nursing homes, one of which was Auburn Hills. Subsequently, the Union, pursuant to the neutrality agreement's procedures, sent a notice of election for Auburn Hills copied to Wilson, in which the Union represented it had the necessary showing of interest to proceed with an election. The AAA conducted the election at Auburn Hills and issued a certification of results on July 20, 2004, stating the election took place on July 16, 2004, with 39 votes for and 5 against the Union.

Martinez testified with the Union's election victory at Auburn Hills there were two changes at the facility pursuant to the national contract. Martinez testified the insurance rates under the national contract are different than that for non-union THI employees. He testified there are also provisions in the national agreement for wage increases for employees who elect to be represented by the Union after the national agreement was negotiated. Martinez and Williams testified that depending on the date of the employees' last wage increase prior to union representation, they would receive between a one-half to two percent wage increase during the first payroll period after the election results were certified. Thereafter, every April and October they would receive an additional two percent wage increase during the duration of the national agreement.[7] By letter dated August 20, 2004, Wilson sent Williams the wage rate for "newly organized facilities" including Auburn Hills. Williams testified the national agreement and the neutrality agreement provided the Union certain access rights to the facilities, and pursuant to

[7] Martinez did not know if the employees at Auburn Hills received a pay increase after the July 20, election, nor did he know if they received a pay increase in October 2004, as provided for in the national agreement.

those agreements the Union officials had access to Auburn Hills.

Williams testified after the election the Union assigned a staff representative to Auburn Hills. She testified initially the staff representative was Monique Davis, then Carl Stamm, and then Dan Griesemer. Stamm maintained a file for the facility. Williams testified the employees at Auburn Hills elected union delegates at the end of September 2004. A union delegate is similar to a union steward. By letter dated October 7, 2004, Stamm wrote Auburn Hills Administrator Michael Federinko naming eight employees as union delegates, stating they were having a training day the following Saturday, and proposing they set up a labor management meeting as called for under the national contract. By letter dated October 31, 2004, Stamm wrote the Union delegates stating he heard from Martinez and the first labor management meeting at Auburn Hills would be held on November 16, 2004.

Kevin St. John, a former employee at Auburn Hills, testified he worked there in 2004 as a member of the agreed upon bargaining unit. St. John left Auburn Hills in August 2005. St. John testified that in 2004, he heard discussions about the Union at the facility. St. John attended a meeting at Auburn Hills conducted by union official Eric Noyes where the employees were asked to sign union cards in an effort to obtain an election. The meeting was in the residents' dining room. St. John testified there was a union election at the facility and around a month after the election the employees received a pay raise. Khawaja Hassan, also a former employee of Auburn Hills, worked there in 2004 as a state tested nursing assistant (STNA), a position within the agreed upon bargaining unit. Hassan testified in 2004 there was talk about a union, and that he voted in an election at the facility. Hassan testified there were some union activities like electing standing committee members for the Union, which took place in the summer of 2004. He named three employees who he recalled who were on the standing committee. Hassan testified the union activities lasted for a short period of time, and after that they never heard anything about a union.[8]

Martinez testified THI ceased operating the Auburn Hills facility in November 2004. Martinez testified THI had a "number of different organizations" including THI Services, Inc. (THI Services). Martinez testified, "I'm not sure how the inner-workings of the different organizations and contracts worked." Martinez thought THI Services processed THI's payroll. Martinez thought THI Services was a separate entity from THI, but that it was under the THI umbrella. Martinez testified THI Columbus was part of THI. He was aware that THI Columbus went into receivership and THI did not. Martinez did not know if THI Columbus operated the Auburn Hills facility rather than THI. State of Ohio records reveal the following through filings during the year 2000: THI, THI Columbus, and THI Services are separate Delaware corporations, each with its principle office in Camp Hill, Pennsylvania, and with an office in Berea, Ohio. Anthony Misitano is listed as the president of all three corporations. THI's corporate purpose is listed as healthcare provider. THI Columbus' corporate purpose is listed as operator of nursing and assisted living facilities. THI Services' corporate purpose is listed as providing management and employment services. In March 2001, THI Columbus registered Auburn Hills Healthcare Center as a trade name in Ohio.

Martinez testified under the national contract THI was supposed to deduct dues at Auburn Hills, but this was not done. Martinez explained the Union was holding off deducting dues or initiation fees and the Union never supplied THI with the notification letter and the signed authorization cards to begin those deductions. Martinez testified he thought the Union

[8] I found St. John and Hassan, former employees with no interest in the outcome of the case, to be credible witnesses who testified in a straight forward fashion.

was waiting for either October or November 2004 to begin those deductions for the facilities organized under the neutrality agreement. Similarly, Williams testified for homes organized after the national contract was executed the Union was waiting until the employees received their October wage increase under the contract, before the Union requested the Employer to start dues deductions. She testified dues deduction never started at Auburn Hills because the Receiver took over on November 12, 2004, which was too close in time to the scheduled October wage increase.

Williams testified on November 15, 2004, she became aware of a change in the status of Auburn Hills as Wilson called her and stated 16 THI Columbus facilities had been placed in receivership.[9] Wilson sent Williams a letter dated November 16, 2004, regarding "THI of Columbus Facilities." The letter attached an order appointing a receiver for all of the THI Columbus facilities. Wilson states in the letter that, "The landlord exercised a stock pledge such that it now controls THI of Columbus and operations of the facilities are being managed by the receiver. Based on the forgoing, THI no longer operates these buildings. The effective date was November 15, 2004." The court order was issued by the court of common pleas, Franklin County, Ohio. The plaintiff was Aegis Services, Inc. and THI of Columbus was the defendant. The order appointed Paul Dauerman of LTC Workouts, LLC as the receiver for THI Columbus. Williams testified 4 of the 16 THI Columbus facilities were represented by the Union.

Wilson sent Williams another letter dated November 24, 2004 stating that:

> On November 19, 2004, I advised you of the appointment of receivers at THI of Columbus and THI of Cleveland and that THI, Inc. no longer operates those legal entities. The purpose of this letter is to keep you up-to-date on developments that might impact the bargaining unit employees.
>
> It is THI, Inc.'s understanding that paychecks for employees at the THI of Columbus and THI of Cleveland facilities are not being issued on the regular scheduled pay date because the funding for the paychecks is not yet available. As a matter of past practice, the payrolls for THI of Columbus and THI of Cleveland have been forwarded to an entity known as THI Services for processing of the payrolls. THI Services would calculate how much each employee should be paid based on time records provided by THI of Columbus, and THI Services would take care of tax withholding and other required deductions. THI Services would then obtain funds from THI of Columbus and THI of Cleveland, respectively, to cover the amount needed for payment of the paychecks for workers at the facility.
>
> THI Services has informed the receivers of THI of Columbus and THI of Cleveland that THI Services is prepared to continue processing payroll for them so long as THI of Columbus and THI of Cleveland make funds available for the payment of any paychecks that will be issued by THI Services. As of this point, THI Services has not received funds that would cover any paychecks to be issued. Accordingly, THI Services cannot issue checks.
>
> THI Services is sending the enclosed letters to personnel at the THI of Columbus and THI of Cleveland facilities. We believe it is clear that THI of Columbus and THI of

[9] Williams testified Wilson told her THI Columbus, THI Cleveland, and THI Baltimore were within the THI organization. Wilson told Williams THI had deals worked out with different sets of landlords with different THI entities. Wilson told Williams whether a home was in THI Columbus, THI Cleveland, or THI Baltimore it was all operated and managed by Misitano and the people working for him.

Cleveland under the direction of their receivers, not THI Services, are the employers of the personnel working at THI of Columbus and THI of Cleveland facilities, and the attached letters so advise employees. Because THI Services is no longer being reimbursed for THI Columbus and THI Cleveland paychecks it issues, this means that THI of Columbus and THI of Cleveland employees should no longer look to THI Services for issuance of their paychecks.

It is our expectation that THI of Columbus and THI of Cleveland, under the control of their respective receivers, intend to continue operating their nursing homes with the existing employees. That is a matter, however, that you will need to confirm directly with the receivers of THI of Columbus and THI of Cleveland. The receiver for THI of Columbus is Paul Dauerman, who is president of LTC workouts, LLC (Address, phone, and fax provided.)….

With respect to the THI of Columbus and THI of Cleveland labor agreements with the SEIU, the effective ownership of those entities has now passed, and those entities are now controlled by the respective receivers of THI of Columbus and THI of Cleveland, who are now the employer of bargaining unit employees there. The SEIU labor agreements covering Columbus and Cleveland bargaining units are now matters for the new operators and receivers at those facilities, not THI Inc., the former owner of those facilities.

On November 29, 2004, Dauerman wrote a letter to addressed to THI-Columbus Facility Staff. Dauerman states, in pertinent part, that:

This letter is to provide you with information about the recent court appointment of a Receiver for the THI-Columbus facilities. There are sixteen (16) facilities that are part of this receivership.

My role as Receiver is to continue operating the sixteen (16) THI-Columbus facilities. Since November 12, 2004, THI no longer will be operating these sixteen (16) facilities. All management and support will come from the Receiver.

The company that has been appointed by the Court is LTC Workouts, based in Columbus, Ohio. Paul Dauerman is the court appointed Receiver. The attorney representing the Receiver is Kinsley Nyce.

Our main objectives are to ensure that resident care continues at the highest level. To accomplish this we need to ensure that each employee is treated respectfully and that we continue everyone's employment and payroll.

* * * *

Every employee is critical to our success. As of Wednesday November 24th, LTC Workouts ensured that you received your paycheck. We were in Court in front of a Judge until 1:00 p.m. and then working with the Judge until nearly 4:00 p.m. to have THI process your check. LTC Workouts/cooperating THI-Columbus made certain the funds were available so that you would be paid…..

In the past it appears that most employees were paid by a company called THI-Services. As a technicality, we will later need to hire you into a new company. You will receive this information soon. YOUR PAY RATE WILL REMAIN THE SAME.

Williams sent Dauerman a certified letter on December 7, 2004, regarding the THI Columbus Union facilities. Williams states in the letter that, as Dauerman was aware, the Union was the recognized collective bargaining agent for a number of THI facilities for whom Dauerman was serving as the court appointed Receiver. Williams cites in the letter Oak Grove Manor, Auburn Hills Healthcare Center, Autumn Court, and Cridersville Nursing Home as four union represented facilities under the receivership. Williams states in the letter that under the NLRA, "you are a successor employer to THI," since the Receiver continued to employ THI's

unit employees at those four facilities. Williams states, "The purpose of this letter is to request that you acknowledge the Union's status as the bargaining agent of the unit employees, and that you commence to bargain collectively with the Union."

Williams testified she left Dauerman several phone messages after sending the December 7 letter. Williams testified Nyce called Williams in response to the letter stating Dauerman had asked him to call. Williams testified she told Nyce the Union believed they were recognized as a matter of law since the Receiver kept the majority of the employees. Williams told Nyce the Union needed to obtain an assumption agreement signed or bargain a new collective bargaining agreement. Nyce responded they were just going to be the Receiver for a short time and he would rather the Union just work with him. Williams testified Nyce made a commitment that the Receiver recognized the Union for all four facilities and they would not change terms and conditions with the exception of healthcare because THI was no longer going to offer it. Williams responded the Union needed a signed agreement assuming the Union's national agreement or they would have to start to bargain. Nyce said he had a history with SEIU Local 47, and he suggested Williams call the president of that local, stating Williams could trust Nyce, and that he would not make any changes. Williams responded she could not do that and the Union needed written documentation. Williams testified Nyce became angry, and started yelling at Williams. Williams hung up and referred the matter to the Union's attorney Mike Hunter. Williams testified that, during the conversation, Nyce said he would ultimately bargain a new contract with the Union, if the Union forced them to bargain. Williams testified Nyce kept insisting it was offensive to him that Williams was pushing this issue. Williams testified that during the conversation she said, "We'll file a ULP."

By letter dated December 9, 2004, union staff representative Stamm notified the employee union delegates at Auburn Hills that Griesemer was the organizer for that facility. He also informed them that it was the Union's position the new owners of the facility had an obligation to bargain with the Union since they hired a majority of the work force from THI.

Hunter testified he had a several meetings with the Receiver's representatives concerning a number of nursing homes, including Auburn Hills. Hunter testified he met with Dauerman once, and with Nyce four times, three of which concerned the four nursing homes in receivership for which the Union claimed recognition. Hunter first met with Nyce on December 21, 2004, in a representational matter at Region 8 concerning an unrelated nursing home. At that time, Nyce agreed to Hunter's request that Nyce and Dauerman meet with the Union concerning Auburn Hills and the three other homes for which the Union claimed representational status.

Hunter met with Nyce and Dauerman on December 29, 2004 in Hunter's office. Dave Regan, the president of SEIU District 1199, also attended the meeting. Hunter testified, "We discussed the fact that, that we represented the employees at four of the homes. The Receiver actually Mr. Nyce indicated that they understood that, that, that I believe the words were, we will honor the process. They indicated that to the extent they could they were trying to follow the THI agreement but that it was necessary that they make changes such as to the insurance that the employees had, that THI's insurance was belly up or whatever and they had to secure other insurance for the people in the homes." Hunter testified there was also discussion about the fact that Dauerman did not know how long he would be in business in that Ralph Hazelbaker who owned the underlying property could sell the homes at any time. Hunter testified there was some discussion that dues deduction had already kicked in at some of the homes and whether the Receiver would continue with that. Hunter testified Nyce said they would and asked the

Union to send the authorization cards to him.[10] Hunter testified there was also discussion about a fight the Receiver was having with a bank called Capital Source. Hunter testified there was a dispute with the bank over who had the preferred security interest in the homes and whether the bank could seize the assets of the homes and sell them. Hunter testified the union representatives asked if it would be helpful for the Union to attempt to intervene in that litigation and Nyce replied he was not sure the Union would want to in view of the large amount of paper work that had been filed. Hunter testified the union representatives indicated they would inquire as whether the Union could assist in putting the Receiver and Hazelbaker in touch with potential buyers and the meeting ended. Hunter testified that, after December 29, 2004, he spoke to Nyce on the phone on one or two occasions and he told Nyce the Union had some representatives of national chains interested in meeting the owner and entering into discussions with the Receiver.

Williams sent Dauerman a certified letter dated January 11, 2005, listing Auburn Hills and the three other nursing homes for which the Union claimed representational status. Williams asked Dauerman to advise the Union of any changes in hours, wages, and terms and conditions of employment at the referenced facilities and the date the changes occurred. Williams did not receive a response to the letter.

Hunter testified he met with Nyce and Regan again on January 12, 2005, in Hunter's office. Hunter testified Nyce brought the Union representatives a document called the receiver's report to the court. Nyce stated he had represented to the court the Receiver was meeting with and getting along with the Union. A sentence in the report states, "No problems with organized labor, non-organized labor or management." Nyce stated he had a discussion with Hazelbaker, who indicated to him that he had no automatic objection to neutrality discussions for unorganized facilities if the Union was able to hook them up with potential buyers.

Williams testified it was her understanding the Union worked out terms with the Receiver to begin dues deduction. She testified she was not present for the meeting, but she understood that Nyce, Dauerman, Hunter and Regan reached agreement. She testified Regan and Hunter directed Nyce to call Anita Bronson in the Union's accounting department, and work with her to begin the dues deduction process. Bronson wrote Nyce a letter dated April 7, 2005, stating that Nyce had contacted her in December 2004, regarding four nursing homes including Auburn Hills. Bronson told Nyce, "As requested I forwarded copies of all membership cards on file" with the Union. Bronson asked Nyce to contact her with an update on their status.

Hunter testified he and Williams met Nyce on April 19, 2005, at the Union's office in Columbus, Ohio. Hunter testified the meeting commenced with Hunter stating because this was going on for a while they needed to come up with a way to formalize the relationship between the parties. He testified Nyce stated he could start to negotiate a contract with the Union tomorrow, but he was not sure it would do any good. Williams said they should schedule that. Nyce then interjected there was a problem he wanted to resolve before discussing other matters. Nyce said union organizer Mary Fleure was accused of making a statement at one of the homes, other than Auburn Hills, about members of management sleeping together, and management was upset about Fleure's remarks. Williams testified that, during the meeting, Hunter identified the things the Union wanted to go over, which included starting dues

[10] Hunter testified the authorization cards were for dues deduction. Hunter testified it was his understanding from business records that the cards were provided, and during a subsequent conversation with Nyce he indicated he believed his office had received the cards, and that his son may have inadvertently filed them with the court.

deduction, and getting a written document assuring the Union the wages, hours and terms and conditions would be honored, and setting up labor management meetings. Then Nyce raised an issue about the actions one of the Union's organizers' actions at what Williams recalled to be the Cridersville facility. Williams testified Nyce wanted her to remove the organizer from the facility and not let her deal with that group of workers. Williams responded she would look into it, but would not pull the organizer from the facility until Williams heard the organizer's side of the issue. Williams testified Nyce became very angry, stood up and started yelling at Williams, questioning the credibility of the Union officials, and questioning Regan's integrity. Williams testified that, after listening to Nyce scream and yell at them for about 5 minutes, Williams told Nyce to "Get the fuck out of the office." She testified Nyce left.[11] Williams testified she used the phrase "F-You" in reference to Nyce when she asked him to leave. She testified that, during the meeting, Nyce alleged that Fluere made inappropriate comments about the sexual relationships of certain management officials. Williams testified there was a discussion about the Union's cards in the April meeting in that at the start of the meeting Nyce was willing to start dues deduction.

Both Williams and Hunter denied Nyce or Dauerman ever said they would not recognize the Union at Auburn Hills. Hunter testified he did not think Nyce asked the Union for authorization cards to support its claim for majority status. Hunter testified, "he told us if we provided the authorization cards he'd institute dues deduction." Hunter testified the Union did not prove recognitional status to Nyce. Hunter testified the Receiver took over all the employees at one fell swoop when it was appointed by the court. Hunter testified that prior to meeting with the Union, Nyce had already seen the documents between THI and the Union, and Nyce was aware the Union represented the employees at the four facilities claimed by the Union. Hunter testified the Receiver negotiated with the Union in very general terms at the three meetings. He testified they explained what they had to do with the insurance, and they had switched who was doing their payroll. Hunter testified no proposals were made. Hunter testified the Union did not file an unfair labor practice charge against the Receiver for failing to bargain because it was the feeling the receivership might end at any time. Williams testified she did not recall Nyce ever telling her if the Union could demonstrate a card majority, he would recognize the Union.

Union Administrative Organizer Carol Walters testified she became aware the receivership ended for Auburn Hills in May 2005. Walters credibly testified to the following: Around early May 2005, she attempted to contact the new owners by phone, and they answered as Multi-Care. Walters left a message, but no one returned her call. Walters then sent a sent a certified letter dated May 6, 2005, addressed to Multi-Care Health Care to the attention of Bob Huff asking to bargain and requesting information.[12] The letter was returned to Walters marked as refused. Walters then resent the letter by regular mail this time not identifying the Union on the envelope as the sender. Rather, Walters used her personal address on the envelope, and the letter was not returned to her. Walters did not receive a response to the letter. A

[11] I found Hunter, considering his demeanor, to be a credible witness. However, Hunter's testimony concerning the content of the discussion about Fleure varied somewhat from Williams. I have credited Williams' account of the argument concerning Fleure since it was between Nyce and herself and Williams had good recall of the exchange. Hunter confirmed Williams' testimony that Nyce stood up at the meeting and accused the Union of unethical conduct. Hunter testified that Williams said "fuck you," and Nyce said he had never been spoken to that way. Then Williams said, "fuck you, fuck you, fuck you", and the meeting ended.

[12] Respondent attorney Bernsen admitted during his testimony that the letter was sent to the correct mailing address.

handwritten note reveals the letter was resent on May 24, 2005. After sending the letter, Walter's called the facility one more time, and left a message on the facility's voice mail for Bob Huff. No one returned the call.

Daniel Griesemer was employed by the Union from November 2004 to July 2005 as an administrative organizer. Griesemer was assigned to service the Auburn Hills facility around the time it went into receivership in November 2004. Griesemer was told around May 2005 the facility had been purchased and the new owner changed the name from Auburn Hills to The Oaks of West Kettering. Griesemer testified Mike Federinko was the administrator of the home while it was a THI facility, while the home was in receivership, and after it was purchased by the new owner. Griesemer testified there was a labor management meeting scheduled at the facility in November 2004 but it was canceled by Federinko, who said he had a conflict in schedules. Griesemer testified there was a discussion about rescheduling the meeting in December, but Federinko thought it would be best to wait until the beginning of the next year. Griesemer testified then communications broke down concerning the scheduling of a meeting.

Griesemer testified he and Stamm attended a meeting with Auburn Hills' employees in November 2004. Griesemer testified he processed a grievance on behalf of Auburn Hills' employee Rochelle Camp for unjust termination. Griesemer met Camp and some co-workers on January 8, 2005, at a McDonalds to discuss the grievance. Camp signed the grievance on that date and said she was going to turn it in that day. Griesemer placed a call to Federinko concerning the grievance. Federinko got back to Griesemer around the middle or end of January and told Greisemer he would to get back to him again after talking to Camp's supervisor and other witnesses. Federinko called Griesemer around a week and one half later. Federinko said he talked to the supervisor and co-workers who backed the Employer's position on the grievance, and there was nothing he was going to do about it. Griesemer testified Camp admitted to part of what Federinko said, and she decided to drop the grievance.[13]

Griesemer testified he conducted union meetings for Auburn Hills' employees at a McDonalds because he was having trouble getting access to the facility. Griesemer testified his records show that on March 18, 2005, he made calls to employees at Auburn Hills to have them attend an on site meeting. Griesemer provided written notice to the facility that he intended to conduct a March meeting, and he also called. When Griesemer showed up on March 24 to conduct the meeting, Federinko was not there and a charge nurse escorted Griesemer out of the building claiming she did not know about the meeting.[14] He testified he dropped off a flyer to be hung up at the facility on a bulletin board in the break room to announce the next meeting. Griesemer testified that on April 4, 2005, he held a meeting for Auburn Hills employees at a local restaurant. He estimated that two to eight employees attended the meeting in two different sessions. Griesemer was at the Auburn Hills facility on May 3, 2005, from 4 to 6 p.m. He testified because he had difficulty going in the front door, he went in the side door to gain access to the break room. Griesemer remained there for a little while, but ended up going back outside and talking to employees during their smoking break. On May 26, 2005, Griesemer made some phone calls trying to contact some of the union membership. On June 7, 2005, Griesemer met with some workers outside of the Auburn Hills facility. Griesemer testified there were elected employee delegates for Auburn Hills and he was given a contact list for the facility.

[13] Griesemer testified there were other grievances he processed while the facility was under receivership, including a grievance filed by dietary workers over the distribution of work hours, which was filled out at the McDonalds during the January meeting.

[14] Griesemer testified he was also escorted out of the building a second time by a nurse when he tried to hold a meeting while the facility was in receivership.

He testified the one he worked most closely with was Camp, who was terminated in January. He testified some of the delegates resigned. However, there were employees who remained as delegates at Auburn Hills during Griesemer's tenure as union representative there.[15]

Former Auburn Hills employee Hassan testified his last stint at Auburn Hills was May 5, 2005, to February 20, 2006, and he had worked there on a prior occasion for 4 years. He testified while he was employed by Auburn Hills, he heard the names THI Columbus, LTC Workouts (LTC), and The Oaks of West Kettering. Hassan credibly testified while he was there the facility never changed, it was the same location, same type of work, there were the same functions and duties, and it was staffed by almost the same employees. Hassan testified the facility was engaged in exactly the same type of business under THI and LTC and there was no shutdown between when THI and LTC operated the facility. Hassan testified when Respondent took over Hassan continued to work there as an STNA, in the same capacity.

A. Respondent's witnesses

Barbara Gentry was employed by Respondent as an LPN at the time of her testimony. She had been employed by Auburn Hills in the same job classification. Gentry testified she is a supervisor. Gentry brought her Auburn Hills W-2 form for the year 2003. The employer's name on the W-2 is THI Services Incorporated-Auburn Hills. Gentry identified an SEIU authorization card she signed dated July 7, 2004. She testified there was a union election held at the Auburn Hills facility and she was permitted to vote. She testified after the Union was voted in she never saw anyone from the Union at the facility again and no meetings were held. Gentry testified after May 2005, when Capital Hill Services had taken over the management of The Oaks of West Kettering, Gentry was mailed a copy of her union card from the Union. Gentry called the Union and spoke to someone whose name she did not recall. Gentry asked what was going to happen because she had not seen anyone from the Union, and did not realize they still had a union. Gentry was told the Union could negotiate or the Respondent could assume the Union's contract. Gentry testified the person from the Union apologized and said they had poor representation because the person the Union appointed to represent them quit.

Kinsley Nyce is an attorney who testified part of his practice involves labor law. Nyce testified he has represented both employers and unions, including another SEIU local in the past. Nyce testified a receiver was appointed by the Court of Common Pleas Franklin County, Ohio in a case captioned Aegis Services, Inc., (Aegis) versus THI of Columbus Inc. Nyce testified THI Columbus had the Auburn Hills site plus 15 other homes in Ohio. Nyce testified Dauerman operated the receivership under the name LTC Workouts, LLC. (LTC) Nyce testified LTC was appointed Receiver for the 16 THI Columbus homes, and the court selected Nyce as counsel. Nyce testified the Receiver took over on Friday, November 12, 2004, by court order. Nyce testified, as a result of another court order, THI Services made the first two payrolls, after the start of the receivership for all 16 homes.

Nyce testified his investigation showed that the prior employer at the Auburn Hills facility was THI Services. Nyce testified THI Columbus had no employees registered with the Ohio

[15] I found Griesemer, considering his demeanor, to be a credible witness. He no longer worked for the Union, and he did not appear to exaggerate on its behalf. Griesemer's testimony was corroborated to certain extent by an activities log he kept as required by his job. I also note that Federinko was not called to dispute his testimony, and Respondent witness Nyce admitted there were grievances filed while the homes were in receivership and there were union postings on the bulletin boards at some of the facilities.

Bureau of Workers' Compensation or with Job and Family Services. Rather, THI Services was the employer of record with those agencies. In Nyce's view THI Columbus was a shell corporation to try and prevent Aegis from obtaining seizable assets. Nyce testified THI Services was the employer on November 12, 2004, of every employee in the 16 nursing homes that were part of the receivership.

Nyce testified LTC, upon becoming the Receiver for THI Columbus, was contacted by the Union. Nyce testified the contact initially was introductory, and to let the Receiver know the Union was there. Nyce testified the first contact was around November 16, 2004. Nyce testified he had over 30 phone calls from various people from the SEIU, and Nyce returned over 30 calls. Nyce testified he had a phone conversation with Becky Williams. He denied that, during the call, he stated the Receiver would recognize the Union. Nyce testified he did not believe Williams requested the Receiver sign an assumption agreement or bargain a new contract with the Union. Nyce testified he did not give Williams assurance the Receiver would do any of those things. Nyce testified Williams did make those requests at another time, but that he did not agree to do that. Nyce explained he had four meetings attended by Union officials and Union requested the Receiver recognize and bargain with them four times face to face. Nyce testified he never agreed to that. Nyce testified that the response was, "No." He testified, "I don't think I ever did give a reason, no."

Nyce testified he requested the Union prove it represented a majority of employees at Auburn Hills and the Union offered to do so. Nyce testified the Union officials told him they would provide him with documents proving they had done certain things in order to be recognized. Nyce testified he asked for copies of the SEIU's signed authorization cards from employees, which from Nyce' experience concerning SEIU cards would also allow Nyce to deduct union dues through Respondent's payroll. Nyce testified the Union did not produce the cards until around April 19, 2005.[16] Nyce testified the cards were not separated by the nursing home in which the employees worked. Nyce testified they could only find a few employees on the cards for any one of the four sites the Union was claiming representational status, including Auburn Hills. Nyce estimated he was given no more than 65 authorization cards for all four homes. He testified he never divided the cards out by each home and he admitted he did not know the number of cards he was given for Auburn Hills. Nyce testified the Union never produced a signed collective bargaining agreement "with us." He testified they presented some documents to Nyce during their second or third meeting, but they were incomplete.

Nyce testified neither he nor the Receiver recognized the Union as the exclusive collective bargaining representative of the employees at Auburn Hills. Nyce testified the Receiver did not feel comfortable that the Union had contracts and documents establishing representational status, or that the Union's relationship at the homes was healthy. Nyce testified what they saw was "quite unhealthy, was actually criminal in several cases. It was very disruptive." Nyce testified when the Receiver took over the Union was going into patient rooms, which the Receiver could not have legally. Nyce testified the Receiver had a series of issues with the Union at the time of the transition. Nyce testified there were physical attacks on the Receiver's employees at two of the sites by SEIU employees.

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[16] Nyce testified he did not recall receiving an April 7, 2005, letter from the Union with authorization cards attached. Nyce testified cards were not sent to him by Ms. Bronson. Rather, Williams threw copies at him during a meeting. He testified there were cards from the four facilities Auburn Hills, Autumn Court, Cridersville and Oak Grove Manor. The cards were not separated by facility when tendered by the Union. Nyce testified no dues were ever deducted by payroll for anyone of the four homes.

Nyce testified he had four meetings with the Union, but his purpose was not for recognizing the Union.[17] Nyce testified he met with the Union on December 10, 2004, and the attendees included Hunter and Regan. Nyce testified the Receiver was under legal attack by a wealthy company called GTCR through another company called Capital Source Finance LLC. Nyce testified there was a large amount of court filings. Nyce testified the Union is a partner with GTCR and Capital Source through investments. Nyce testified his agenda at the meeting was to get the Union to stop the companies from attacking the Receiver.[18] Nyce testified the receivership was never intended to last longer than 30 to 45 days. He testified it lasted longer than expected in a large part because of the attack by GTCR and Capital Source Finance.[19]

Nyce testified the next meeting was in January with Nyce, Hunter, Regan, and another individual from the Union in attendance. Nyce testified he asked if they were able to do anything to get GTCR and Capital Source Finance off his back. The response was they were working on it. Nyce testified they asked if he was willing to recognize the Union. Nyce testified, "I said can't do that. Can't go there. Won't do that. We're not doing that." Nyce testified he explained that he had not received a copy of a contract. Nyce testified he told the Union officials that you say you represent them, but no proof was provided, and he asked they provide it to him. Nyce testified the response was we will work on that. Nyce asked if he could get cards, and the response was we will work on that. Nyce testified the third meeting with the Union was around March 25, 2005, was almost a repeat of the second, except the Union was indicating they do represent the employees. He testified they said they could not help the Receiver with GTCR or Capital Source Finance.

Nyce testified he attended an April 19, 2005, with the Union at their request to see if they could change Nyce's mind. The meeting was at the SEIU's offices with Nyce, Hunter and Williams in attendance. Nyce testified that, during the meeting, the union representatives continued to say they represented the employees, but presented no proof. Nyce testified he was not going to change the Receiver's position. Nyce testified he told them he had been asking them to have one of their organizers to stop the physical, the confrontational and threatening contacts at one of the properties. Nyce stated that if they were ever to get along they should have that person stop. Nyce testified he was told you do not tell the Union who to put in, and Williams screamed at Nyce to "go fuck" himself 28 times.

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[17] Nyce testified he wrote down the dates of the meetings, at first he refused to show the document to the General Counsel, although he brought it with him to the witness stand. Nyce testified, "I count it as an attorney work product. This is from my client." Nyce later voluntarily offered to show the document, stating the real reason he refused to display it was he had written a poem on it.

[18] Nyce testified he asked the Union to help with GTCR at all four meetings. Nyce testified during the meeting Regan said he would inquire about purchasers for the 16 facilities through the Union's long term care people.

[19] Nyce testified it was his belief in November and December 2004 the receivership would not last a long time, but that changed in early 2005. However, Nyce testified he did not recall telling the Union the receivership would not last long. He then testified, "as a matter of fact the receivership did not go on very long because these homes all transitioned before, 15 of the 16 homes transitioned before November approximately the fifth of '05. So that's really, in terms of operating the homes, only six months. The very last one was August I think 31st of 2005." Nyce then testified it was possible he told the union officials he did not expect the receivership to last a long time. However, he denied telling the union officials this was the reason he was refusing to sign an assumption agreement with the Union.

Nyce testified the Union did not filed grievances against LTC, but they did file grievances in the four homes for which they claimed recognition. Nyce testified there were several grievances filed. Nyce testified that neither he nor Dauerman participated in any monthly labor management committee meetings with the Union, and that he and Dauerman were the only ones who would have participated. Nyce testified that, during the receivership period, the Union did post notices on bulletin boards in the four homes for which they claimed representational status, although he did not know if notices were specifically posted at Auburn Hills. Nyce testified the Receiver never recognized the Union as the collective bargaining representative for the employees at Auburn Hills, and the Receiver never bargained with the Union over the terms and conditions of employment of those employees. Nyce denied telling Hunter or Williams that the Receiver would honor the process concerning the Union. Nyce testified health insurance for the employees changed when the Receiver took over. Nyce testified it was very possible he told the Union about the change. Nyce testified he did not recall whether the Union provided him with authorization cards or dues deduction cards. Nyce testified he repeatedly asked for proof of majority status. Nyce testified he was not made aware there was a certification election at Auburn Hills during the time THI was the employer. He testified the Union never presented a AAA certification to Nyce.

Nyce testified when Auburn Hills was sold to its current owner, the facility was not sufficiently staffed to meet state requirements concerning the ratio of staff to the number of residents. Nyce testified the Receiver had an arrangement with the state of Ohio for each of the 16 facilities that they did not have to staff according to state requirements, but that anyone that operated the facilities following the Receiver would have to follow the state rules. Nyce testified, under state law, the state of Ohio was required to operate the 16 homes rather than the Receiver, but the state had not been successful in operating homes in the past. As a result, the state allowed the Receiver to operate the homes in an understaffed fashion.

Ken Bernsen is an attorney representing Respondent and he is president of Capital Health Services Incorporated (Capital Health). Bernsen testified a company called Carriage Inn of Kettering Real Estate Holdings Inc. entered into an agreement to purchase Auburn Hills and then assigned the purchase rights to The Oaks of West Kettering Inc. (Respondent). Bernsen testified Respondent subsequently concluded the acquisition transaction and the purchase occurred in July 2005. Bernsen testified under the assigned purchase agreement the purchaser did not assume any liabilities of the prior owner, and it did not assume any labor contracts with the prior operator. Prior to acquiring the title to the facility, Respondent operated it under a lease agreement under the name of The Oaks of West Kettering. The lease agreement started on May 5, 2005. When Respondent began operating the facility it changed the name from Auburn Hills to The Oaks of West Kettering. Bernsen testified that prior to Respondent operating the facility it was operated by the Receiver. Bernsen testified Respondent is the current owner of the facility. Bernson testified Capital Health has a management agreement with Respondent to manage the facility. Bernsen does not hold any position with Respondent or with the home.[20]

[20] Bernsen testified the owners of Respondent are Robert and Lynn Huff. The Huffs are Bernsen's father in law and mother in law. Bernsen testified Multi Health Services is a defunct healthcare management company. The principles in that company were Robert and Lynn Huff. Bernsen testified Multi Health Services was replaced by Capital Health. The principles of Capital Health are Bernsen, Bernsen's wife, Sara Manning and Josh Huff. Bernsen testified Carriage Inn of Kettering Real Estate Holdings is a company that no longer exists. The principles owners were Robert and Lynn Huff.

Bernsen testified he was the attorney who represented Carriage Inn of Kettering Real Estate Holdings, Inc. and he reviewed the asset purchase agreement for Auburn Hills between that company and Kettering Medical Properties Corp., the prior owner. He testified the agreement was later assigned to Respondent. Page 18 and 19 of the asset purchase agreement provides, in pertinent part:

> Purchaser acknowledges that the employees may currently be unionized or claim to be unionized, as a result of the actions or agreement of Operator or a parent or affiliate of Operator and that the Purchaser may be obligated to recognize or otherwise deal with the union(s) as the authorized labor representative or collective bargaining agent for the Property; and Purchaser assumes all cost risk expense and effort required to deal with such union, whether or not technically legal or binding obligations of Seller or Purchaser, or that Purchaser may as a practical matter have to assume or pay some or all of the Employee Liabilities in order to maintain, retain or obtain a productive workforce, and Purchaser has made full investigation of the labor situation prior to entering into the interim lease or closing on this Purchase Agreement.

Bernsen testified he was aware of this statement before the agreement was signed. He claimed that, prior to Carriage Inn of Kettering Real Estate Holdings Inc. entering into the purchase agreement for the facility; Bernsen conducted an investigation around the spring of 2005. Bernsen testified he was told by around six employees, whose names he could not recall, and by the administrator that at one time there may have been a union there but they were not around anymore. He testified he never contacted the Union or AAA as part of his investigation.

Bernsen testified some time after May 5, 2005, the Union sent Respondent a letter requesting Respondent to recognize it as the collective bargaining representative for some of the employees at the facility . Bernsen testified this was the only communication he had with the Union. Bernsen could not state whether the May 6, 2005, letter from Walters to Huff was the letter Respondent received. When asked what the Union's letter said, Bernsen testified, "I don't remember." Bernsen did not have any conversations with anyone from the Union.

Bernsen testified the late summer of 2005 was when he first learned there had been a union election at Auburn Hills. Bernsen initially testified the Receiver provided Bernsen with a copy of the national contract between THI and SEIU. He then changed his testimony stating, "I, I have a copy now. I don't know when I received them and I don't remember who gave them to me to be honest with you." Bernsen later testified the Receiver did not provide him with a copy of the national contract, but he did not know who provided it to him. Bernsen testified he did not think he had the contract prior to purchase of the facility from the Receiver. However, Bernsen was copied a position statement to Region 9, dated August 5, 2005, from Respondent's counsel Dennis Grant. Contrary to Bernsen's claim that the national contract was not provided to him by the Receiver, the position statement reads at page 1, as follows:

> As part of its due diligence, The Oaks inquired of LTC Workouts as to whether there were any collective bargaining agreements covering its employees or the former employees of THI. LTC Workouts provided the Oaks with a copy of an unsigned collective bargaining agreement reciting a proposed effective date of April 1, 2005 and having attached a proposed 'neutrality' agreement, which specifically listed Auburn Hills as one of THI's 'non-unionized facilities.'

It is stated at page 3, paragraph 7 of the August 5, 2005 position statement that:

> 7. The receiver (prior operator), LTC Workouts, said that the Charging Party allegedly had organized the facility's employees at some time in the past through a national agreement with THI. However, LTC Workouts also said that the Charging Party had abandoned the facility's then bargaining unit sometime in (the) fall 2004 and was never heard from again. The Oaks was supplied with two different agreements, neither one of which names Auburn Hills as a party to or as being covered by either contract. The unsigned copy of a purported national agreement lists Auburn Hills as one of THI's "non-unionized" facilities…..

Bernsen testified there is an Ohio state law defining the minimum staffing for nursing homes based on sufficient staff to provide so many direct care hours per day per resident. Bernsen testified under the state formula he had to increase the staffing at Auburn Hills at the time Respondent acquired the facility. Bernsen testified the "people that operated the facility concluded that more care was needed both for under state law and just for the welfare of the residents." Bernsen testified this decision was made by the administrator, the director of nursing, and outside consultants. Bernsen testified he thought it was concluded prior to Respondent taking over the facility that it was not adequately staffed under state law.

Bernsen testified he based the conclusion that Respondent did not meet the state staffing requirements upon an oral report they received from a nursing consultant firm. Bernsen testified the consultant told him that if he did not increase staffing, he would be violating state code. Bernsen testified it was the consultant's analysis concerning the state code, not his own. He testified the consultant did not go over the provisions with him stating, "We didn't get into that much detail." Bernsen later testified he did not know if Respondent was operating with fewer employees than the state required when it began operations on May 5, 2005.

Bernsen testified the Receiver operated the home for around six months. He testified the staffing level at which the Receiver operated was pretty close to the staffing when Respondent acquired the facility in May 2005. He testified Respondent increased the staffing level in July 2005 by about 25 to 30 people. He testified the new employees were doing the same type of work as the employees when Respondent took over in May. Bernsen testified that in the bargaining unit, an employee could be a nurse's aide providing direct care to the resident; they could perform activity tasks, laundry, housekeeping, and maintenance. He then changed his testimony stating some of the new hires were doing the same types of tasks but that, "I don't know if we started new programs or whatever, I'm not sure." He then admitted, even if new programs were started it was the same type of work, caring for patients. Bernsen testified the employees hired in July were performing work covered by the stipulated bargaining unit, regardless of whether Respondent instituted any new programs. Bernsen did not know if the number of Respondent's patients increased between May and July 2005. He testified if there was an increase, it was not significant. While Bernsen testified Respondent's officials felt they were not adequately staffed when they took over, he admitted no patients were asked to leave during the 2 months it took them to increase the staffing.

B. Respondent's stipulation that it hired a representative complement of employees when it began operations on May 5, 2005

The following exchanged occurred at the hearing on May 2, 2006, in Bernsen's presence:

> JUDGE FINE: Don't you have a stipulation that the -- that it's a representative complement that was hired by the new company?
> MS. FINCH: No -- uh, well, no -- well, we do at this point in time. But I think their

position was that as of a certain date they were going to hire more, that this was not --
JUDGE FINE: The Employer is not contending that there's not --
MR. GRANT: We've --
JUDGE FINE: -- a representative complement?
MR. GRANT: Yeah. You're correct, Your Honor. That was an issue during the investigation. It took too long to complete the renovation. We had problems with our contractor. We have stipulated that as of the date we took over a representative complement of employees --
MS. FINCH: Okay.
MR. GRANT: -- majority came from the receiver.

* * * *

MR. GRANT: And if it doesn't cover that, we will stipulate that we are not asserting the renovation of the first floor changed our representative workforce complement.
MS. FINCH: Okay.
MR. GRANT: I'll offer that stipulation now.
JUDGE FINE: Is that satisfactory to you?
MS. FINCH: That's satisfies, yes, it does. You?

On the Morning of May 3, 2006, Respondent's counsel Grant agreed to enter into evidence a written stipulation via a revised version of Joint Exhibit 1, which reads as follows:

> On November 11, 2004, certain employees were employed at the facility known as Auburn Hills, in the positions set forth in the Unit, excluding all LPNs. On November 12, 2004, LTC Workouts, LLC, Receiver, herein called LTC, began operating the Auburn Hills Healthcare facility. LTC continued to operate the facility until May 5, 2005, when Respondent began operating the facility as The Oaks of West Kettering. On May 5, 2005, Respondent employed a majority of the bargaining unit employees, excluding LPNs, who were former LTC employees, and these employees constituted a majority of Respondents' employees in a representative complement of employees in the agreed upon bargaining unit in this proceeding.

Thereafter, on May 3, 2006, the following exchange occurred:

JUDGE FINE: Well I'm talking about when did you - - what was the date that you took over?
MR. GRANT: May 5.
MR. BERNSEN: May 5th of 2005.
JUDGE FINE: All right so I would expect but at the time that you -- I mean the receiver wasn't in there that long. What was it about five months?
MR. BERNSEN: Six months.

* * * *

JUDGE FINE: So at the time that you took over in 2005 did these employees still constitute a majority of your work complement?
MR. BERNSEN: We don't believe so, no.
JUDGE FINE: So do you know one way or the other?
MR. BERNSEN: I do. From my analysis we hired a minority of the employees on the November 11th list of 2004 as compared to our first payroll in May of 2005.
JUDGE FINE: Do you have a copy of that payroll that you're going to submit into evidence?
MR. BERNSEN: I do.

* * * *

JUDGE FINE: So but you have no way of determining because so you're saying there

was some turnover at the -- did you basically hire all the receiver's employees is that --
MR. BERNSEN: Not all but –
JUDGE FINE: Most of them.
MR. BERNSEN: The majority of them yeah.
JUDGE FINE: So there was turnover at the time, assuming the receiver hired all the employees of THI, however you want to characterize it, there was turnover during the six-month period?
MR. BERNSEN: That is correct.

* * * *

MR. GRANT: It has always befuddled us that there is a presumption of majority status piled on another presumption of majority status as part of the Board's case. We did not hire a majority of THI's; our majority did not come from THI's payroll prior to the receivership. Those were the only records we had as part of the acquisition. When the Board finally produced the receiver's payroll as of May fifth we, of course, hired most of those people. We didn't hire them all but yes receiver's employees we hired the majority. THI's employees, no. In fact as I, as I –

* * * *

MR. GRANT: Well we've got -- yeah. 78, I'm sorry, 75, 30 are carryovers from THI, 45 are not carryovers, 75 in the unit. That's our position.
JUDGE FINE: Is that excluding - -
MR. GRANT: And Mr. Bernsen can –
JUDGE FINE: LPN's?
MR. GRANT: - - Testify to that.
MR. GRANT: Here's an LPN. You didn't put a check mark or anything beside their name.
MR. BERNSEN: I did here.
MR. GRANT: Okay. So you included the LPN's?
MR. BERNSEN: I believe I included the LPN's at the time because there was a question as to the --
JUDGE FINE: Well if you take away the LPN's did then you hire a majority?
MR. BERNSEN: I would need a 10-minute --
MR. GRANT: There are how many LPN's, Ken, eight, 14?
JUDGE FINE: Off the record.

* * * *

MR. GRANT: I would like to first move --Respondent wishes to withdraw from the final sentence of Joint Exhibit Number 1, the stipulation which we entered into this morning at the urging of various parties. My client, my client was not present at the time. It was my understanding that that statement was accurate. Subsequently I have spoken with the attorney for the receiver, who advised me the facility was understaffed according to ratios required by the Ohio Nursing Home law. And my client has informed me that it was not until the time it acquired the facility in July, I believe July 15th of 2005 before its representative comple-, before its complement was obtained and that is its work force complement as of today.[21]

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[21] Grant filed a position statement with Region 9, dated August 5, 2005. It was stated therein that Respondent was over the next six months renovating first floor patient rooms, and when that was complete it was expected that an additional 24 staff members would be hired. It was stated that, “It is the position of The Oaks that its full workforce complement has not yet been hired.” Nothing was mentioned in the position statement about the need to increase staff between May and July 2005, to meet state requirements or that a representational complement was not achieved until mid July 2005, a contention which was only first raised by Respondent

Continued

JUDGE FINE: So Joint Exhibit 1 you're talking about the sentence that reads, On May 5th, 2005 Respondent employed majority of the bargaining unit employees excluding its LPN's who were former LTC employees and these employees constitute a majority of Respondent's employees in a representative complement of employees in a, in the agreed upon bargaining unit in this proceeding'?
MR. GRANT: Correct. We believe that the representative complement was obtained in mid July 2005 Your Honor.
JUDGE FINE: And so you want to -- the remaining, the remainder of the stip you're not attempting to withdraw from?
MR. GRANT: No, sir.
MS. FINCH: Well General Counsel opposes that. Mr. Grant represented his client, we discussed that yesterday and we discussed that on the record, however, and his client was present yesterday. And then subsequently today I was asked to put it, you know to add it in writing but that was discussed on the record yesterday.

Bernsen testified the first floor at Auburn Hills was still under renovation at the time of his testimony on May 3, 2006, and that there were no patients on the first floor. Respondent stipulated it was not raising the renovation as a defense to whether the employees working the facility on May 5, 2005, constituted a representative complement. Respondent stipulated there was no contention that the basic business changed at the Auburn Hills facility, or that the facility closed at any point in time. Respondent stipulated Auburn Hills was the same business while operating under all three entities during the relevant time period of this proceeding.

C. Credibility

Having considered their demeanor, I found the testimony of Nyce and Bernsen to be inconsistent, and to be undermined by documentary evidence, as well as by the inherent probabilities of the record as a whole. The AAA conducted an election at Auburn Hills and issued a certification of results on July 20, 2004, stating the election took place on July 16, 2004, with 39 votes for and 5 against the Union. On November 12, 2004, through May 5, 2005, the Receiver took over the operation of Auburn Hills, along with 15 other homes. Williams sent Dauerman a certified letter on December 7, 2004, stating in the letter that, as Dauerman was aware, the Union was the recognized collective bargaining agent for four named homes, including Auburn Hills. Williams stated in the letter that under the NLRA, “you are a successor employer to THI,” since the Receiver continued to employ THI’s unit employees at those four facilities. Williams stated, “The purpose of this letter is to request that you acknowledge the Union’s status as the bargaining agent of the unit employees, and that you commence to bargain collectively with the Union.” Williams testified Nyce called Williams in response to the letter stating Dauerman had asked him to call. Williams testified she told Nyce the Union's position was they believed they were recognized as a matter of law since the Receiver kept the majority of the employees. Williams told Nyce the Union needed to either get an assumption agreement signed or bargain a new collective bargaining agreement. She testified Nyce responded they were just going to be the Receiver for a short time and that he would rather the Union just work with him. Williams testified during the call Nyce made a commitment that the Receiver recognized the Union for all four facilities and they would not change terms and conditions with the exception of healthcare because THI was no longer going to offer it. Similarly, Union attorney Hunter testified that during a meeting with Nyce and Dauerman on December 29, 2004 they “discussed the fact that, that we represented the employees at four of the homes. The receiver actually Mr. Nyce indicated that they understood that, that, that I

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during the second day of the hearing.

believe the words were, we will honor the process. They indicated that to the extent they could they were trying to follow the THI agreement but that it was necessary that they make changes such as to the insurance that the employees had, that THI's insurance was belly up or whatever and they had to secure other insurance for the people in the homes."

Yet, Nyce incredibly claimed that the Union requested the Receiver recognize the Union four times during face to face discussions, that he told them no. He initially testified that he did not think he ever gave a reason for his refusal. I find it highly unlikely that Nyce would point blank deny representational status to experienced Union representatives who had recently won and election at the Auburn Hills facility, and who made a formal claim of successorship by certified mail to the Receiver without their taking immediate legal action. Moreover, although Nyce initially claimed he never gave the Union a reason for his refusal to recognize the Union, he also testified he asked the Union to prove its majority status at Auburn Hills and that the Union produced authorization cards. I find this testimony highly doubtful. First, there was never any claim from the Union that they established a card majority at Auburn Hills. Rather, the Union had tendered enough cards for a showing of interest for an election, and they won the election and were certified by AAA. It would have been very easy for the Union to have supplied the AAA certification if Nyce had requested proof of their representational status. However, I have concluded via the credible testimony of Hunter and Williams that Nyce never did so.[22]

I have concluded it was Nyce's intent to inform the Union verbally the Receiver recognized them, then to stall their requests for a written agreement, to allow the Receiver to sell the home unencumbered by any written documentation between the Receiver and the Union. Thus, on January 12, 2006, Nyce provided Hunter with a copy of the Receiver's report to the court overseeing the receivership. In it the Receiver states, "No problems with organized labor…" Clearly, such a statement could not have been made if Nyce had point blank informed the Union that the Receiver was not going to recognize it, as Nyce contended in his testimony. I also do not credit Nyce's contention that the Union supplied authorization cards as a means of establishing majority status. Rather, it was both Williams and Hunter's credible testimony that the cards were supplied to facilitate dues deduction. This is confirmed by a letter from the Union's accounting department to Nyce stating cards had been supplied. It is more likely as Williams testified that the Union's accounting department would have been involved to coordinate dues deduction than to aid in recognitional status.

I also credit Williams and Hunter's version of the April 19, 2006, meeting over that supplied by Nyce. First, Nyce displayed a somewhat combative nature during his testimony at trial. I find it far more likely that he was the provocateur during the meeting than Williams. Both Williams and Hunter testified Nyce complained about one of the Union's agents making remarks about the sexual conduct of management at one of the Receiver's facilities. Williams credibly testified that Nyce asked her to remove the agent from the facility, which she refused to do until hearing the union agent's side of the story. Both Hunter and Williams testified that during the

[22] A position statement provided by Respondent during the Region's investigation reveals the Receiver provided Respondent with a copy of the Union's national contract and the neutrality agreement. Thus, the Receiver had documentation relating to the Union's status at Auburn Hills, and I infer the Receiver was also supplied a copy of the AAA election certification for that facility. Moreover, Griesemer's undisputed testimony reveals Federinko was the administrator at Auburn Hills for THI, the Receiver, and Respondent. I infer that he would have informed both the Receiver and the Respondent of the election, particularly when Bernsen testified he contacted the administrator about the Union's status at the facility.

meeting, Nyce stood up and started yelling at the union officials in a provocative nature. At which point, Williams leveled an epithet at Nyce and the meeting ended.[23] Nyce testified the union agent was involved in physical, confrontational, and threatening contacts. Yet, he provided no written documentation of this somewhat severe allegation and I do not credit him that it took place or was mentioned during the meeting in the face of Hunter and Williams' credible testimony. Rather, I find, as Hunter credibly testified, that at the outset of the meeting Hunter asked for a way to formalize the relationship between the parties to which Nyce responded he could begin contract negotiations the next day but he did not think it would do any good. Nyce thereafter diverted the attention of the union representatives with the allegation pertaining to the union agent, and he did so in a provocative manner and the meeting ended. I do not find it to be a coincidence that the meeting took place on April 19, and that Auburn Hills was no longer under the Receiver's control shortly thereafter on May 5, 2005. I find Nyce instigated the argument with Williams to divert Hunter and Williams' request for written documentation pertaining to the Receiver's prior recognition of the Union. I find Nyce engaged in this conduct because he was aware a transfer of the facility was in the works, and he did not want the transaction to be further encumbered by a written representational agreement or a collective bargaining agreement between the Receiver and the Union.

Bernsen testified he read a provision in the purchase agreement stating the purchaser acknowledged the employees may be currently be or claim to be unionized as a result of actions or agreement of the operator or a parent or affiliate of the operator. He claimed he spoke to the administrator and six unnamed employees and was told there may have been a union there at one time, but they were not around anymore. However, I have concluded that Bernsen knew more than he was willing to admit. The evidence establishes the Union won an election at Auburn Hills in July 2004, and the administrator and employees would have been aware that took place. Thus, I have concluded that Bernsen new this information before Respondent purchased the facility. Along these lines, Bernsen admitted to having a copy of the Union's national contract and the neutrality agreement, but he denied it was furnished to him by the Receiver. Yet, a position statement submitted by Respondent's attorney Grant states the Receiver provided Respondent with those documents.

Contrary to Nyce's claims that he wanted the Union to establish majority status, Respondent's August 5, 2005, position statement asserts that, "LTC Workouts, said that the Charging Party allegedly had organized the facility's employees at some time in the past through a national agreement with THI." The statement goes on to state that LTC said the Union had abandoned the facility's then bargaining unit sometime in the fall of 2004 and was never heard from again. There could be no claim of abandonment of the unit by the Union without the basic acknowledgement by the Receiver and the Respondent that they were aware the Union had organized the employees in the first instance. Moreover, the claim of abandonment in the fall of 2004 is undercut by Nyce's testimony that he received 30 calls from Union representatives and he returned 30 calls. Nyce also had multiple meetings with the Union, and the Receiver received correspondence shortly after it took over requesting bargaining.

I do not credit Respondent's claims that the Union abandoned the bargaining unit, or that Bernsen thought that was the case. Bernsen testified he contacted Federinko about the status

[23] Hunter testified that Williams repeated the epithet more times than she was willing to admit, and to the extent that number of times has any consequence I credit Hunter on this point. I find that Nyce exaggerated the number of times she cursed him. However, the fact that he claims to have counted confirms my finding that it was his intent to provoke Williams.

of the Union, and Griesemer credibly testified the Union tried to set up labor management meetings with Federinko in November and December 2004, and Griesemer processed a grievance with Federinko in January 2005. Finally, Bernsen was aware the Union by written request asked for bargaining with Respondent shortly after Respondent took over the facility. Yet, Respondent never responded, nor did Bernsen's investigation of the Union's status include an inquiry with the Union. I have concluded Respondent's actions contained a fixed intent not to recognize the Union regardless of the merits of the Union's claims.

D. Analysis

1. Legal Principles

The Board considers four criteria to determine whether separate entities are a single employer**.** These are interrelation of operations, common management, centralized control of labor relations and common ownership. *Radio & Television Union 1264 v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256 (1965). No one of the four criteria is controlling nor need all be present to warrant a single-employer finding. *Blumenfeld Theatres Circuit,* 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980); *Emsing's Supermarket,* 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989). The first three criteria are more critical than common ownership. *Airport Bus Service,* 273 NLRB 561 (1984), disavowed on other grounds in *St. Marys Foundry Co.,* 284 NLRB 221 fn. 4 (1987) and particular emphasis is placed on whether control of labor relations is centralized, as this tends to show "operational integration." *NLRB v. Al Bryant, Inc.,* 711 F.2d 543, 551 (3d Cir. 1983).

In *Fall River Dyeing & Finishing v. NLRB,* 482 U.S. 27 (1987), the Court held that an employer which purchases the assets of another, is required to recognize and bargain with a union representing the predecessor's employees when there is a "substantial continuity" of operations after the takeover, and following a demand for bargaining there is a majority of the new employer's workforce, in an appropriate unit, consisting of the predecessor's employees at a time when the successor has reached a "substantial and representative complement." In *Maintenance Incorporated,* 148 NLRB 1299, 1301 (1964), it was stated that:

> The duty of an employer who has taken over an 'employing industry' to honor the employees' choice of a bargaining agent is not one that derives from a private contract, nor it is one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to White Castle's corporate identity or physical assts, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over.[24]

In *Fall River Dying,* supra, the Court noted the employer's initial hiring goal was to attain one full shift of workers, which meant from 55 to 60 employees. The employer then planned, if business permitted, to expand to two shifts. The employees who were hired first spent 4 to 6 six weeks in start-up operations and an additional month in experimental production. By letter to the employer dated October 19, 1982, the union requested recognition and bargaining. The employer refused. At that time, 18 of the employer's 21 employees were former employees of

[24] See also *Hudson River Aggregates, Inc.,* 246 NLRB 192 (1979), enfd. 639 F.2d 865 (2nd Cir. 1981).

the predecessor employer. By November 1982, the employer had employees in a complete range of jobs, had its production process in operation, and was handling customer orders. By mid-January 1983, it had attained its initial goal of one shift of workers. Of the 55 workers in the initial shift, which represented over half the workers the employer would eventually hire, 36 were former employees of the predecessor employer. The employer continued to expand its work force, and by mid-April 1983, it had reached two full shifts and for the first time the predecessor employees were in the minority, but just barely, with 52 or 53 out of 107 employees. The Court upheld the Board's substantial and representative complement rule noting that by mid-January the employer had hired employees in virtually all job classifications, had hired at least fifty percent of those it would ultimately employ in the majority of those classifications, and it employed a majority of the employees it would eventually employ when it reached full complement. The Court held that at that time the employer had begun normal production. While the employer intended to expand to two shifts, and reached that goal by mid-April, that expansion was contingent expressly upon the growth of the business. The Court concluded that mid-January was the period when the employer reached its substantial and representative complement, and because at that time the majority of the employer's employees were former employees of the predecessor, the employer had an obligation to bargain with the union then.

In *Briggs Plumbingware v. NLRB,* 877 F.2d 1282, 1286-1287 (6th Cir. 1989), the court stated:

> The concurrence of two events is necessary to obligate the successor employer to bargain with the union: the successor's employment of a 'substantial and representative complement' of the predecessor's employees and the union's demand for recognition. *Fall River Dyeing,* 107 S.Ct at 2237-38, 2241.
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> In *Jefferson Lithograph,* the Ninth Circuit clearly articulated five factors, cited with approval in *Fall River Dying,* supra, which the Board considers in determining when the employer has hired a substantial and representative complement:
>
> > (a) whether the job classifications designated for the operation 'were filled or substantially filled'; (b) whether the operation was in 'normal or substantially normal production'; (c) the size of the complement on the date of normal production; (d) the time expected to elapse before a substantially large complement would be at work; and (e) the relative certainty of the employer's expected expansion. (Citation omitted.)

In *Briggs Plumbingware,* supra, the court approved the Board's determination that a representative complement had been reached when 24 of 27 job classifications were filled and all steps of the production process were in operation. Production had reached 50 percent of that projected, and the employer had reached 68 percent of the projected work force with the remaining employees to be added over the next six months.[25]

In *Pacific Hide Fur Depot, Inc.,* 223 NLRB 1029 (1976), enf. denied 553 F.2d 609 (CA 9 1977), a successor employer hired 6 of 18 of the predecessor's employees, plus an employee who had been laid off by the predecessor. The successor began its operation with seven employees on April 11, hired five additional employees between April 11 and May 5, and hired

[25] See also *Hudson River Aggregates, Inc.,* 246 NLRB 192, fn. 3 (1979), enfd. 639 F.2d 865 (2nd Cir. 1981), where the Board found the respondent had hired a representative complement of 30 to 40 employees in April 1978 when it began full scale operations, not in October 1978 when it had expanded its work force to 90 employees.

an additional seven employees between May 22 and June 6 when it reached what it considered to be its full complement of 19 employees. None of the additional 12 employees had worked for the predecessor, except two who had been laid off without expectancy of future employment. The union in that case made a demand for recognition and bargaining on April 17, when 7 out of the 10 of the employer's employees had worked for the predecessor. The Board found that a bargaining obligation attached to the successor employer. It was stated therein that "It is not a matter of whether a majority of former employees are among the total denominated an ultimate complement; but instead whether under 'substantially unchanged' operations a work complement is composed primarily of predecessor employees at the time a perfected demand for recognition arises." Id. at 1031.[26]

In *Myers Custom Products,* 278 NLRB 636 (1986), an employer commenced operations on September 13, 1984, with 13 unit employees and the parties stipulated the employer planned before beginning operations to take 2 to 3 months to select and train a full employee complement. The employer accomplished its goal in less that 60 days, and during that time almost doubled its employee complement. When it reached what it deemed to be its full complement it had 25 employees 10 of whom had worked for the prior employer. In concluding a bargaining order was not warranted the Board stated, "based on the stipulated facts, that when the Respondent began operations, it planned with a reasonable degree of certainty, a substantial increase in the number of unit employees within a relatively short time." Id at 637. The Board in *Myers Custom Products* distinguished *Pacific Hide & Fur Depot,* supra stating that in that case "the record did not reveal that when the respondent commenced operations it knew how many employees it would need or how long it would take to hire the work force." *Myers Custom Products,* supra at 637, fn. 3. See also, *Erica Inc.,* 344 NLRB No. 96 (2005), where the *Myers* exception was found not to apply where the respondent employer failed to establish that it had any reasonably certain hiring plans besides its initial work force and that a bargaining order there was warranted.

In *Bronx Health Plan,* 326 NLRB 810, 812, (1998), enfd. 204 F.3d 51 (DC Cir. 1999), the Board stated, "It is well established that the bargaining obligations attendant to a finding of successorship are not defeated by the mere fact that only a portion of a former union-represented operation is subject to a sale or transfer to a new owner so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation." (Citations omitted.) In *Bronx Health Plan* an employer was found to be a successor employer when it hired a group of clerical employees who constituted only a small fraction of the collective bargaining unit of the predecessor employer. See also *Shares, Inc., WAP, Inc., and WAP, LLC, a Single Employer,* 343 NLRB No. 59 (2004), enfd. 433 F.3d 939 (7th Cir. 2006).

2. The status of THI, THI Columbus, and THI Services and the initial recognition of the Union

I find THI and its affiliates THI Columbus and THI Services either constituted a single employer of the employees of Auburn Hills or that THI was the employer and that it used the

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[26] While the ninth circuit denied enforcement of the Board's order, the ninth circuit's decision issued prior to the Supreme Court's *Fall River,* supra. opinion and the ninth circuit's opinion was premised on a successor employer reaching a full complement of employees rather than a representative complement. Moreover, as set forth below, in *Myers Custom Products,* 278 NLRB 636, 637, fn. 3 (1986), the Board affirmed its rationale in *Pacific Hide Fur Depot, Inc., supra* and I am bound by Board law.

named affiliates for tax, accounting and reporting purposes. See, *Shares, Inc., WAP, Inc., and WAP, LLC, a Single Employer,* supra. State of Ohio records reveal the three entities were separately incorporated, but Misitano was the president of all three corporations. THI officials negotiated a neutrality agreement listing Auburn Hills, and that facility was organized pursuant to the terms of the neutrality agreement, and thereafter the national contract which was also negotiated by THI officials applied to Auburn Hills. The Union was certified by AAA on July 20, 2004, following an election conducted on July 16, 2004, in a document listing THI as the employer. Martinez, THI's vice president of human resources, testified THI either owned or leased the Auburn Hills nursing home in 2004. Michael Wilson, senior vice president of labor relations for THI, was THI's chief spokesperson for negotiations of the national contract, and Martinez was on THI's bargaining committee. Martinez testified that THI was responsible for Auburn Hills, along with 34 other Ohio facilities, and THI supervised the employees, hired and fired them, and gave them pay raises. He testified THI operated the building for patient care, purchased supplies, and took care of the residents.

Martinez testified he had the authority to negotiate on behalf of THI Columbus and THI in that THI CEO Misitano gave Martinez that authority. Martinez testified he understood the negotiations for the national contract included Auburn Hills. Martinez testified THI Columbus was part of the national contract, although it is not specifically referenced therein. Similarly, Williams testified it was her understanding THI Columbus was part of THI, and there were 16 homes that THI operated or managed under the name of THI Columbus. She testified SEIU had a labor agreement with THI Columbus in that the national contract covered homes THI operated under that name. Williams testified when she bargained for the Union with Misitano, Wilson and Martinez they bargained on behalf of 50-plus facilities some of which were operated under the name of THI Columbus. Williams testified the THI officials said they had legal authority to bargain for the facilities for which they reached agreement with the Union.

Martinez and Williams' credited testimony reveals that: Under the terms of the neutrality agreement, on June 28, 2004, the Union sent Wilson a notice of intent to organize three nursing homes, one of which was Auburn Hills. Subsequently, the Union, pursuant to the neutrality agreement's procedures, sent a notice of election for Auburn Hills copied to Wilson, in which the Union represented it had the necessary showing of interest to proceed with an election. The AAA conducted the election at Auburn Hills and issued a certification of results on July 20, 2004, stating the election took place on July 16, 2004, with 39 votes for and 5 against the Union. By letter dated August 20, 2004, Wilson sent Williams the wage rate for "newly organized facilities" including Auburn Hills. Williams testified the national agreement and the neutrality agreement provided the Union certain access rights to the facilities, and pursuant to those agreements the Union officials had access to Auburn Hills. The agreement also provided for a wage increase shortly after the election. Former Auburn Hills' employees St. John and Hassan confirmed there was an election at the facility in 2004, and St. John testified the employees received a pay raise shortly after the election.[27] By letter dated, October 7, 2004, Union Staff Representative Stamm wrote Auburn Hills Administrator Federinko naming eight employees as union delegates. Hassan confirmed that employee committee members were elected at the facility. By letter dated October 31, Stamm wrote the delegates that a labor management committee meeting was scheduled for mid November, 2004, although the meeting was subsequently cancelled by Federinko.

Thus, I have concluded the record amply establishes that THI officials controlled the labor relations at Auburn Hills. While Auburn Hills went into receivership under the name of THI

[27] Respondent witness Gentry also testified there was an election there in 2004.

Columbus both THI and THI Columbus had the same president, and Misitano, Wilson and Martinez were the officials who set the labor relations policies for THI and THI Columbus. Thus, there was common management, and centralized control of labor relations between THI and THI Columbus. Wilson's letter to Williams, dated November 24, 2004, states that, pursuant to past practice, THI Columbus employee pay checks were forwarded to THI Services for the processing of payrolls, and the latter would calculate the moneys owed each employee, tax withholdings and other required deductions. THI Services would then obtain the money from THI Columbus to fund the paychecks for the employees at each facility. The letter was written from THI's perspective and states THI was the former owner of the facilities at issue. Thus, there was also an interrelation of operations between THI, THI Columbus, and THI Services.[28] I find, based on the forgoing, that THI operated Auburn Hills through its affiliates THI Columbus and THI Services, that THI set the labor relations policies for Auburn Hills, and that the Union won an election at that facility in July 2004, pursuant an agreement negotiated with THI establishing the Union as the collective bargaining representative for the employees there.[29]

2. The Receiver's status and oral recognition of the Union

Pursuant to a court order, THI Columbus encompassing 16 facilities including Auburn Hills was placed in receivership and the Receiver began operating the facilities on November 12, 2004. On November 24, 2004, the Receiver sent THI Columbus employees a letter informing them they would need to be hired to a new company and their rate of pay would be the same. Williams sent Dauerman a certified letter dated December 7, 2004, informing him that as he was aware the Union was the recognized collective bargaining representative for Auburn Hills, and three other named facilities. Williams stated the Receiver was a successor employer under the National Labor Relations Act since the Receiver continued to employ THI's unit employees at the named facilities. Williams requested the Receiver acknowledge the Union's status as bargaining agent for the named employees and that they commence bargaining a contract. Williams' credited testimony reveals Nyce called Williams in response to the letter stating Dauerman had asked him to call. Williams told Nyce the Union believed they were recognized as a matter of law since the Receiver kept the majority of the employees. Williams told Nyce the Union needed to either get an assumption agreement signed or bargain a new collective bargaining agreement. Nyce responded they were just going to be the Receiver for a short time and he would rather the Union just work with him. Nyce made a

[28] While THI Services was listed as the employer on an employee's pay stub in 2003, and while Nyce testified that same entity was listed as the employer in the state of Ohio for workmen's compensation, I have concluded this was done as part of the interrelationship of operations between the three THI entities. While Nyce claimed THI Services was the employer, the receivership was obtained through a lawsuit against THI Columbus, not THI Services, further demonstrating the interrelationship of THI and its affiliates. Respondent cites in its brief Martinez' testimony wherein he stated THI Services was not covered by the Union's national contract. I do not place much reliance on this testimony as Martinez admittedly did not know the legal relationship between the three THI entities, although he testified to a certainty that he had authority to bargain on behalf of THI Columbus and on behalf of Auburn Hills. I found Wilson's November 24, 2004, letter to Williams to be instructive that THI Services merely acted to process the payroll for THI Columbus, and have concluded that THI used THI Services for accounting services and reporting requirements with state agencies.

[29] I do not view the lawfulness of the neutrality agreement, the July 2004 election, or THI's recognition of the Union to be an issue in this proceeding concerning the Union's representational status. In this regard, no charge was filed over THI's recognition of the Union. See, *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411 (1960).

commitment that the Receiver recognized the Union for all four facilities named in her December 7, 2004, letter, and he stated they would not change terms and conditions of employment at those facilities with the exception of healthcare because THI was no longer going to offer it. Nyce refused Williams' request for a signed agreement assuming the Union's national contract, or to begin to bargain. During the conversation, Nyce said he would ultimately bargain a new contract with the Union, if the Union forced them to bargain.

Following Williams' phone call with Nyce, Hunter and Regan met with Nyce and Dauerman on December 29, 2004. Hunter's credited testimony reveals they discussed the Union's claim that they "represented the employees at four of the homes." He testified Nyce indicated they understood that and they would honor the process. The Union representatives were told the Receiver was trying to follow the THI agreement but they had to make changes in insurance from that provided by THI. Hunter testified there was discussion that dues deduction had started at some of the homes and Nyce said they would continue with that, and he asked the Union to send him authorization cards. Hunter met with Nyce and Regan again on January 12. During the meeting Nyce gave the Union representatives a thick document called the receiver's report to the court. Nyce stated he had represented to the court the Receiver was meeting with and getting along with the Union. A sentence in the report states, "No problems with organized labor, non-organized labor or management."

Hunter and Williams met with Nyce on April 19, 2005. Hunter credibly testified the meeting commenced with Hunter stating because this was going on for a while they needed to come up with a way to formalize the relationship between the parties. He testified Nyce stated he could start to negotiate a contract with the Union tomorrow, but he was not sure it would do any good. Williams said they should schedule that. Nyce interjected there was a problem he wanted to resolve before discussing other matters. Nyce then accused a union agent of making an untoward remark about members of management at one of the homes, other than Auburn Hills.[30] Williams credibly testified Nyce wanted her to remove the agent from the facility. Williams responded she would not pull the agent until Williams heard her side of the issue. Williams testified Nyce became very angry, stood up and started yelling about Williams, questioning the credibility of the Union officials, and questioning Regan's integrity. Williams testified that, after listening to Nyce scream and yell at them for about 5 minutes, Williams told Nyce to "Get the fuck out of the office." She testified Nyce left. Williams testified there was a discussion about the Union's authorization cards being sent to the Receiver during the April meeting and that at the start of the meeting Nyce was willing to process the dues deduction.[31]

Hunter testified he did not think Nyce asked the Union for authorization cards to support its claim for majority status. Hunter testified, "he told us if we provided the authorization cards he'd institute dues deduction." Hunter testified the Union did not prove recognitional status to Nyce. Hunter testified the Receiver took over all those employees at one fell swoop when it was appointed by the court. Hunter testified that prior to meeting with the Union, Nyce had already seen the documents between THI and the Union, and Nyce was aware that the Union represented the employees at the four facilities claimed by the Union. Hunter testified the

[30] Both Hunter and Williams testified Nyce accused the union official of making allegations concerning the sexual conduct of certain management officials.

[31] Hunter confirmed Williams' testimony that during the discussion about the Union agent, Nyce stood up and accused the Union of unethical conduct. Hunter testified Nyce said he had not seen anything that unethical in a while. Hunter testified that Williams said "fuck you," and Nyce said he had never been spoken to that way. Then Williams said, "fuck you, fuck you, fuck you", and the meeting ended.

Receiver negotiated with the Union in very general terms at those three meetings. He testified they explained what they had to do with the insurance, and that they had switched who was doing their payroll. Hunter testified no proposals were made. Hunter testified the Union did not file an unfair labor practice charge against the Receiver for failing to bargain because it was the feeling the receivership might end at any time.

Griesemer testified he processed a grievance on behalf of Auburn Hills' employee Camp for unjust termination in January 2005. Griesemer testified Federinko, the administrator of the facility, spoke to Griesemer on two occasions about the grievance, told Griesemer he had investigated it, and that he was affirming the discharge.

Thus, by certified letter dated December 7, 2004, Williams made a request to bargain with the Receiver. During the phone conversation following the letter, Nyce made a commitment to recognize the Union and stated the Receiver would not change the terms and conditions of employment, except for healthcare. Similarly, during a meeting with Hunter and Regan on December 29, 2004, in Dauerman's presence, Nyce agreed with Hunter's assertion that the Union represented employees at four homes, including Auburn Hills, stated the Receiver would honor the process, and that the Receiver was trying to follow the THI agreement, but that they had to alter health insurance from that provided by THI. I find that Nyce, on behalf of the Receiver agreed to recognize the Union by his comments to the Union representatives. See, *City Lumber and Hardware, Inc.,* 305 NLRB No. 78 (1991) and *Contemporary Guidance Services,* 291 NLRB 50, 64 (1988), enfd. 140 LRRM 2886 (2d Cir. 1990), where the Board affirmed the validity of oral agreements to recognize a union. Here, Nyce informed the Union representatives that the Receiver recognized the Union, that the Receiver only intended to operate the facilities for a short period of time, and to the extent possible the Receiver would apply the THI collective bargaining agreement while it operated the facility.[32]

I find the Receiver was a successor employer to THI. See, *Specialty Envelope Co.,* 321 NLRB 828, 829 (1996), where a receiver was found to be a successor employer. In this regard, the Receiver and THI's payroll records reveal the Receiver hired a majority of THI's employees, including Federinko the administrator of the facility. Respondent stipulated, at the hearing, that there was no contention the facility closed at any time, or that the basic business changed at the

[32] Since the Receiver recognized the Union, I reject Respondent's Section 10(b) defense that the Union's failure to file a charge against the Receiver somehow vitiates Respondent's bargaining obligation. Moreover, since I find the Receiver was a successor employer to THI it had a bargaining obligation with the Union, whether or not the Union pursued that obligation through litigation. I have discredited Nyce's testimony that he refused the Union's request for recognition, or that he asked for proof of majority status. Respondent's position statement to the Region revealed the Receiver provided Respondent with the Union's national contract and neutrality agreement with THI. Having obtained these documents, I infer the Receiver also obtained the AAA certification for Auburn Hills from THI. In this regard, it is likely the Receiver obtained all the referenced documents from THI as Hunter credibly testified the Union did not provide the Receiver proof of majority status, and Williams testified Nyce admittedly knew the terms of the THI contract during their initial call which was prior to Nyce having met with any of the Union officials. Moreover, the election at Auburn Hills was in July 2004 and the Receiver took over in November of that year. The Receiver retained THI Auburn Hills Administrator Federinko as the Receiver's administrator for the facility. I find that Federinko knew of the Union election, and he would have imparted that knowledge to Nyce who admitted he spoke to Federinko.

facility. Respondent stipulated at the hearing that the home was the same business while operating under THI, the Receiver and Respondent.

3. Respondent's refusal to recognize and bargain with the Union

Respondent began operating the facility on May 5, 2005. Union official Walters sent Respondent owner Robert Huff a letter by certified mail dated May 6, 2005, requesting bargaining. The letter was returned to Walters marked refused on the envelope. It is well established that a Respondent's failure or refusal to accept or claim certified mail cannot defeat the purposes of the Act. *ITAL General Construction, Inc.,* 331 NLRB No. 64 (2000); and *Michigan Expediting Service,* 282 NLRB 210, fn. 6 (1986), enfd. 869 F.2d 1492 (6th Cir. 1989). Moreover, Respondent admits in its amended answer that the Union sent a letter on or about May 6, 2005, requesting to bargain and that it refused the Union's request to bargain effective on that date. Walter's also left a phone message for Huff in early May, but the call was not returned.[33]

The payroll records of Respondent, the Receiver, and THI show that for Respondent's first full pay period which included bargaining unit members with May 5 to 10 hire dates Respondent had 48 bargaining unit employees, 33 of whom had worked for THI, and 45 of whom had worked for the Receiver. I have concluded, as Respondent admits in its amended answer to the complaint, that the Union perfected its request to bargain on May 6, 2005.[34] I

[33] On May 24, 2005, Walters resent the May 6, 2005, letter by regular mail to Huff this time using her own return address as opposed to the Union's on the envelope. The May 24, 2005, date is obtained from Walter's handwritten note on the envelope. The May 24 mailing was not returned to Walters. I have used the May 6, 2005, date for establishing the Union's request to bargain as well as for calculating the Union's majority status at Respondent although Respondent had employed a majority of its employees in the bargaining unit from the predecessor employers as of both May 6 and May 24, 2005. Bernsen admitted Respondent received a letter requesting recognition from the Union. Respondent did not produce any letter from the Union, and there was no claim by the Union that any other letter was sent besides Walters' letter. Since I have credited Walters' testimony that she sent the letter by regular mail, I have concluded it was Walters' letter mailed on May 24, 2005, which Bernsen admitted Respondent received.

[34] Respondent, at pages 31 and 46 in its post-hearing brief, attempts to back track on this admission in its amended answer that the Union requested bargaining on May 6, 2005. It does so based on its technical argument that Walters May 6, 2005, letter was addressed by Bob Huff-Multi Care Health Care, rather than Bob Huff, The Oaks of Kettering, Inc. However, Bernsen admitted the letter was otherwise properly addressed and the envelope contained SEIU listed for the return address. Bernsen's testimony reveals Huff was the owner of Respondent and he was the one time owner of a company called Multi Health Services. Bernsen also admitted Respondent received a request for bargaining from the Union, which I have concluded was a copy of the May 6, 2005, letter resent on May 24, 2005. At page 3 and 4, paragraph 8, of its August 5, 2005, position statement, Respondent appears to admit it received a request to bargain from the Union with the letter being addressed to Multi-Health Services, Inc., or MC as designated in the position statement. Respondent states in the position statement at paragraph 8 that it did not answer because it did not agree with the Union's claim that it was a successor employer to THI. Respondent makes no claim in the position statement that the Union's letter was not properly addressed. Respondent's position statement also contains an acknowledgement that the Receiver informed Respondent that the Union had at one time organized the facility, and the asset purchase agreement contains Respondent's

Continued

have concluded that a substantial and representative complement of Respondent's employees were employed at that time of the Union's May 6, 2005, request for bargaining, that a majority of those employees were employed by Respondent's predecessor be it THI or the Receiver, and that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union as it requested in its May 6, 2005, letter.

I reject Respondent's contention that the appropriate date for determining a representative complement of employees was July 16, 2005. On August 5, 2005, Respondent filed a position statement with the Region asserting at page 2 and 3 that "While the THI payroll report only describes the departments and not the job titles, it is staffing structure was comparable to that of The Oaks, the assumed bargaining unit would contain a total of 75 employees. Again, 30 of those were former THI employees and 45 were not." Respondent was relying on its August 1, 2005, payroll report to obtain the figures set forth in the position statement. No explanation was given as to why that date was picked. Respondent also claimed in the position statement that the first floor of the facility was being renovated, and it was contemplated that the renovation would be done in six months with the need at that time to increase staff by 24 people, although job classifications of those individuals were not cited. Respondent states in paragraph 8 of the position statement that as of August 5, 2005, it had not hired its full work force complement.

At the unfair labor practice trial on May 2, 2006, Respondent through attorney Grant stated it took too long to complete the renovation, which had not been completed at the time of the hearing, and therefore Respondent was no longer relying on the renovation as an argument that the work force was going to expand. Grant went on to state on May 2, 2006, in Bernsen's presence that "We have stipulated that as of the date we took over a representative complement of employees--….—majority came from the receiver." On the morning of May 3, 2006, Grant, on behalf of Respondent, agreed to the following written stipulation, "On May 5, 2005, Respondent employed a majority of bargaining unit employees, excluding LPNS, who were former LTC employees, and these employees constituted a majority of Respondent's employees in a representative complement of employees in the agreed upon bargaining unit in this proceeding." At the hearing on May 3, 2006, Bernsen at first represented that Respondent hired a minority of bargaining unit employees employed by THI in Respondent's first payroll stating, "From my analysis we hired a minority of the employees in the November 11th list of 2004 as compared to our first payroll in May of 2005." However, Respondent's calculation apparently did not exclude LPN's which Respondent sought and obtained an agreement from the Union to exclude from the unit as supervisors.[35] When Respondent returned from a break in the proceeding, its position changed and it now sought to disavow a portion of the written stipulation it entered into on the morning of May 3, 2006. Grant stated as follows, "Respondent

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acknowledgement that the employees may currently be organized or claim to be organized. Thus, I have concluded that Respondent knew the purpose of Walter's May 6, 2005, certified letter at the time it refused service. I therefore reject Respondent's Section 10(b) argument enunciated in its brief that the Union only requested recognition to the Receiver on December 7, 2004, and that it never requested recognition from Respondent and therefore the charge was untimely filed. I decline to allow Respondent to disavow its admission in its amended answer to the complaint. Moreover, the underlying facts do not support its contention.

[35] While the parties' stipulation alters the unit by the exclusion of LPNs, the parties agreed that the unit without the LPNs is an appropriate unit. I therefore conclude the removal of the LPNs from the unit does not alter the Union's representational status. See, *Bronx Health Plan,* 326 NLRB 810, 812, (1998), enfd. 204 F.3d 51 (DC Cir. 1999), and *Shares, Inc., WAP, Inc., and WAP, LLC, a Single Employer,* 343 NLRB No. 59 (2004), enfd. 433 F.3d 939 (7th Cir. 2006).

wishes to withdraw from the final sentence of Joint Exhibit Number 1, the stipulation which we entered into this morning at the urging of various parties. My client, my client was not present at the time. It was my understanding that that statement was accurate. Subsequently I have spoken with the attorney for the receiver, who advised me the facility was understaffed according to ratios required by the Ohio Nursing Home law. And my client has informed me that it was not until the time it acquired the facility in July, I believe July 15th of 2005 before its representative …complement was obtained and that is its work force complement as of today."

In *Extended Health Services, Inc.,* 347 NLRB No. 50, (2006) the Board stated:

> '[I]t is generally accepted that a stipulation is conclusive on the party making it and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it. *Kroger Co.,* 211 NLRB 363, 364 (1974) (footnote citation omitted). [FN3] The Board's strict standard is due, at least in part, to the parties' choice to forgo offering evidence at the hearing in favor of reliance on the stipulation. Id. at 364. Here, neither party called any of the five employees at issue to testify concerning his or her whereabouts between 6 and 6:16 a.m. on September 22.
>
> * * * *
>
> FN3. See also *Woodland Clinic,* 331 NLRB 735, 741 (2000); *Lott's Electric Co.,* 293 NLRB 297, 297 fn. 1 (1989), enfd. mem. 891 F.2d 282 (3d Cir. 1989) (asserted inexperience of counsel insufficient to set aside stipulation); *Interstate Material Corp.,* 290 NLRB 362, 366 (1988), enfd. mem. 902 F.2d 37 (7th Cir. 1990) (asserted incorrectness of stipulation insufficient to set it aside).

While Grant represented Respondent on or before August 5, 2005, it was not until May 3, 2006, the second day of the unfair labor practice trial that he was informed of any contention by Bernsen, who is also an attorney, that Respondent did not meet the state staffing requirements when Respondent began to operate the facility on May 5, 2005. Nyce, who was called to testify by Respondent, claimed when Auburn Hills was sold to its current owner, the facility was not staffed sufficiently to meet state requirements concerning the ratio of staff to the number of residents. Nyce testified the Receiver had an arrangement with the state of Ohio to allow the Receiver to operate the facility in an understaffed fashion. Yet, the Receiver operated the facility from November 12, 2004 to May 5, 2005. Moreover, Nyce never testified how far understaffed the facility was, nor did he claim there were any problems in the operation of the facility as a result of the staffing.

Bernsen testified there is a state law setting forth the minimum staffing required for nursing homes in Ohio. Bernsen testified that under the state formula he had to increase the staffing at Auburn Hills at the time Respondent acquired the facility. Bernsen also testified the "people that operated the facility concluded that more care was needed both for under state law and just for the welfare of the residents." Bernsen testified he thought it was concluded prior to Respondent taking over the facility that it was not adequately staffed under state law. Yet, as set forth above, Bernsen did not inform Respondent's counsel of this position until the second day of the unfair labor practice trial in May 2006.

Bernsen testified the Receiver operated the home for around six months. He testified the staffing level at which the Receiver operated was pretty close to the staffing when Respondent acquired the facility in May 2005. Respondent had 48 bargaining unit employees in its initial payroll in May 2005, and 75 employees on it August 5, 2005 payroll for an increase of 27 employees. No evidence was put in the record of how many of the hiring of these new employees was actually due to a real or perceived failure to meet state guidelines, or of when the plan actually came in to fruition to hire these employees. Bernsen could not even testify to a

certainty that Respondent was operating below state requirements when Respondent first began operating the facility as the following exchange reveals:

> BY MS. FINCH:
> Q. Now did – are there any documents--Mr. Nyce testified that the state gave him permission to operate under the state minimum standards?
> A. I don't know anything about that.
> * * * *
> Q. Okay. So was the 55 or so employees that you had on May the fifth was that the minimum state required?
> A. I don't know.
> Q. Was it below the minimum state required?
> A. I believe so but I don't know. I -- the calculation, I don't have it in front of me to tell you how it all calculates out.
> Q. So you operated for two months outside the compliance with the state minimum requirements?
> A. I didn't testify to that.

Bernsen testified Respondent had a similar staffing level to that of the Receiver when Respondent began operations in May 2005. He testified the employees hired thereafter were performing the same type of work as the employees when Respondent took over in May and that the employees hired in July were performing work covered by the stipulated bargaining unit. Bernsen testified there was no significant increase in the number of Respondent's patients between May and July 2005. While Bernsen testified Respondent's officials felt they were not adequately staffed when they took over, he admitted no patients were asked to leave during the 2 months it took them to increase the staffing. Bernsen testified his conclusion that Respondent was understaffed when it took over was based on an oral report from outside nursing consultants. Bernsen testified it was the consultant's analysis concerning the state code, not his own and that they did not "get into that much detail."

Based on the quality and content of Bernsen's testimony I do not credit his claim that there was a plan to hire any specific amount of new employees at the time Respondent took over the operation.[36] Rather, Respondent's argument appears to be a last minute attempt to alter its legal strategy when it realized at the hearing that the initial count of bargaining unit employees would not cut in Respondent's favor. Moreover, if Nyce's and Bernsen's testimony concerning state standards were to be credited the facility operated for a period of about 8 months without meeting state staffing requirements, although according to Bernsen's testimony patient levels appeared to be static during that period, or at least during the May to July 2005 period when Respondent was operating the facility.

Thus, I have concluded that as of May 6, 2005, the job classifications designated for the operation were filled or substantially filled and Respondent's facility was in normal production. Accordingly, I find there was a representative complement of employees at the time the Union made and Respondent rejected its request to bargain on May 6, 2005. I find Respondent was a successor employer to the Receiver, as the Receiver was to its predecessor THI, and that Respondent violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain. See, *Fall River Dyeing & Finishing v. NLRB,* 482 U.S. 27 (1987), *Briggs Plumbingware*

[36] In fact, Respondent was initially claiming in its August 2005 position statement that it intended to greatly expand its operation through renovation prior to establishing a full count of employees, a claim Respondent dropped at the hearing.

v. NLRB, 877 F.2d 1282 (6th Cir. 1989), and *Pacific Hide Fur Depot, Inc.,* 223 NLRB 1029 (1976) enf. denied 553 F.2d 609 (CA 9 1977). *Myers Custom Products,* 278 NLRB 636 (1986), cited by Respondent is distinguishable from the facts herein. There in concluding a bargaining order was not warranted the Board stated, "based on the stipulated facts, that when the Respondent began operations, it planned with a reasonable degree of certainty, a substantial increase in the number of unit employees within a relatively short time." Id at 637. Even assuming arguendo that at the time Respondent took over the facility, Respondent was operating below state staffing requirements Respondent failed to show how far below those staffing requirements it was operating, or that it had any definite plan as to the number or time period when any new employees were to be hired. Rather, during the second day of the unfair labor practice hearing taking place almost a year after the event Respondent first posited its contention that it was below state staffing requirements. The argument even took Respondent's counsel by surprise.[37]

CONCLUSIONS OF LAW

1. The Union has been at all times since May 6, 2005, and is, the exclusive bargaining representative of Respondent's employees in the following unit (the unit) for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All service and maintenance employees, including but not limited to: certified nursing assistants, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, at the 1150 West Dorothy Lane, Kettering, Ohio facility but excluding professional employees, RNs, LPNs, managers, supervisors, department heads, confidential employees including medical records, physical therapy assistants, respiratory therapists, social workers, technicians, and guards as defined by the Act.

2. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the representative of its employees in the unit.

3. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

Remedy

I find for the reasons set forth by the Court in *NLRB v. Burns International Security*

[37] I reject Respondent's request to withdraw from the written stipulation that it had hired a representative complement of employees at the time it began operation in May 2005. I do not find any special circumstances warranting the withdrawal. If Respondent's position is credited, Bernsen, an attorney, knew Respondent was operating below state levels prior to Respondent taking over the facility in May 2005. Thus, this is not newly discovered evidence previously unavailable to Respondent. However, in view of my rejecting Respondent's defense for the reasons set forth above, I do not find it necessary to rely on the disputed stipulation in making the unfair labor practice findings herein. I would note in passing that in addition to those employees employed as of Respondent's May 10 payroll, it hired 4 more employees on May 24, 2005, 15 more employees in mid to late June 2005, for a total of 19 new employees. Yet, Respondent had a turnover of 14 employees during May 4 to August 5, 2005. The Unfair labor practice charge was filed and served on July 7, 2005, and it was only after the filing the charge that Respondent hired 14 more employees in mid to late July 2005. Thus, the new hires prior to the filing of the charge appear to be more or less a replacement for employee turnover, and it was only after the charge was filed that Respondent altered its staff size.

Services, 406 U.S. 272, 281 (1972) and in *Fall River Dyeing & Finishing v. NLRB,* 482 U.S. 27, 37-41 (1987); and by the Board in *Smoke House Restaurant,* 347 NLRB No. 16 (2006) and *Williams Enterprises,* 312 NLRB 937 (1993), enfd, 50 F.3 1280 (4th Cir. (1995), that an affirmative bargaining order is warranted in this case as a remedy for Respondent's unlawful refusal to recognize and bargain with the Union. Here, the Union won an election at THI in July 2004, and was certified by AAA in a vote of 39 to 4. THI began to apply the national contract to the Union informing it of the wage rates at the facility, and there was testimony at a wage increase was implemented within a month of the election as required by the agreement. The facility went into receivership in November 2004. Union officials immediately contacted and met with representatives of the Receiver who informed them that the Receiver would only be in business for a short time, but would recognize the Union and honor the national agreement save for health insurance. A Union staff representative was appointed for the facility and he attempted to meet with employees and processed a grievance with the administrator of the facility. Respondent's August 5, 2005, position statement reveals that Respondent had been informed by the Receiver that the Union had organized Respondent's facility. Similarly, the purchase agreement informed Respondent that it may have a bargaining obligation with the Union. While Bernsen testified there were reports from some employees that they lost contact with the Union, there were no statements made that employees indicated they no longer wanted Union representation. Thus, the Union recently won an election prior to the transfer of the facility, and filed timely requests to bargain with the Receiver and Respondent. Respondent's unlawful refusal to recognize the Union could only serve to undermine the Union's support and place doubt in the minds of the employees of the Union's representative status. *Fall River Dyeing & Finishing v. NLRB,* supra at 39-41. An affirmative bargaining order removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures the Union will not be pressured, by the possibility of a decertification petition or by the Respondent's withdrawal of recognition, to achieve immediate results at the bargaining table following the resolution of its unfair labor practice charge and issuance of a cease-and-desist order. A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such result would be particularly unfair here in view of the delay in bargaining caused by Respondent's unlawful refusal to recognize the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

The Respondent, The Oaks of West Kettering, Inc., located in Kettering Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) From refusing to recognize and bargain in good faith with Service Employees International Union District 1199, The Health Care and Social Service Union, AFL-CIO as the exclusive collective-bargaining representative of its employees in the appropriate collective

[38] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining unit described below.

All service and maintenance employees, including but not limited to: certified nursing assistants, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, at the 1150 West Dorothy Lane, Kettering, Ohio facility but excluding professional employees, RNs, LPNs, managers, supervisors, department heads, confidential employees including medical records, physical therapy assistants, respiratory therapists, social workers, technicians, and guards as defined by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Kettering, Ohio, copies of the attached notice marked "Appendix." [39] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 6, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. September 12, 2006

Eric M. Fine
Administrative Law Judge

[39] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National labor Relations Board” shall read “Posted Pursuant to a Judgment of the United Stated Court of Appeals Enforcing and Order of the National Labor Relations Board.”

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize and bargain in good faith with Service Employees International Union District 1199, The Health Care & Social Service Union, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the appropriate bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, meet and bargain with the Union as the exclusive representative of our employees in the following appropriate bargaining unit with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such agreement in a signed contract:

All service and maintenance employees, including but not limited to: certified nursing assistants, environmental aides, supply clerks, ward clerks, cooks, dietary aides, laundry aides, housekeepers, at the 1150 West Dorothy Lane, Kettering, Ohio facility but excluding professional employees, RNs, LPNs, managers, supervisors, department heads, confidential employees including medical records, physical therapy assistants, respiratory therapists, social workers, technicians, and guards as defined by the Act.

THE OAKS OF WEST KETTERING, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m. 513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.